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Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

ARTHUR L. PIMENTAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the U.S. Attorney for the District of Massachusetts violated the grand jury secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure by disclosing secret grand jury materials to the Massachusetts Insurance Fraud Bureau ("IFB") under the exception authorizing disclosure to "government personnel," Fed. R. Crim. P. 6(e)(3)(A)(ii), even though the IFB is a privately funded and operated organization described by the Massachusetts Supreme Judicial Court as a "private investigative agency." *In re Ellis*, 680 N.E.2d 1154, 1160 (Mass. 1997).

2. Whether the First Circuit effectively gutted the requirement that the mailing forming the basis of a mail fraud conviction be made "for the purpose of executing" the scheme to defraud, as set forth in *Schmuck v. United States*, 789 U.S. 705 (1989), by reinstating two mail fraud convictions merely because the mailings could have been found to "help maintain a harmonious relationship between the perpetrator and the victim," ignoring *Schmuck*'s requirement that the scheme must in some way depend on the charged mailings.

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PETITION FOR A WRIT OF CERTIORARI

Arthur L. Pimental petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *United States v. Pimental*, 380 F.3d 575 (1st Cir. 2004) (attached as App. A).[1] The orders of the district court relevant to the Rule 6(e)(3)(A)(ii) violation are at *United States v. Pimental*, 236 F. Supp. 2d 99 (D. Mass. 2002) (App. B), 204 F.R.D. 223 (D. Mass. 2001) (App. C), 201 F.R.D. 24 (D. Mass. 2001) (App. D), and 199 F.R.D. 28 (D. Mass. 2001) (App. E). The order of the district court relevant to the mail fraud issue is at *United States v. Pimental*, 236 F. Supp. 2d 99 (D. Mass. 2002) (App. B).

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 2004. A timely petition for rehearing was denied on October 15, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

The relevant portions of Fed. R. Crim. P. 6(e)(3)(A)(ii) and 18 U.S.C. § 1341 may be found in the Appendix attached hereto at App. G and H, respectively.

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[1] The citation "App.__" refers to Mr. Pimental's Appendix submitted with this Petition. Materials submitted in Mr. Pimental's Appendix to the First Circuit will be cited as "D.App.___." The citation "D.Add.__ refers to Mr. Pimental's Addendum submitted to the First Circuit.

STATEMENT

A. Overview

Petitioner Arthur L. Pimental operated a small construction business that employed a handful of ironworkers erecting one- or two-story steel structures in eastern Massachusetts. *United States v. Pimental*, 236 F. Supp. 2d 99, 101-02 (D. Mass. 2002). After an investigation spearheaded by the Insurance Fraud Bureau of Massachusetts ("IFB"), a federal grand jury indicted Mr. Pimental and his wife, Loretta Pimental, on 14 counts of mail fraud under 18 U.S.C. § 1341 (Counts 2-15) and one count of conspiracy (Count 1) under 18 U.S.C. § 371. *Id.* at 102. According to the indictment, the Pimentals schemed to defraud their workers' compensation insurance carriers by misrepresenting to insurers the size of their payroll and the company's work in order to pay lower insurance premiums. *Id.* Before trial, the Pimentals moved to dismiss the indictment on the ground that the United States Attorney violated Fed. R. Crim. P. 6(e) by disclosing secret grand jury materials to the IFB during the investigation. *United States v. Pimental*, 380 F.3d 575, 583 (1st Cir. 2004). The court concluded that the government violated Rule 6(e), but found the error to be harmless. *Id.* at 583. After a seven day trial, the jury found Ms. Pimental not guilty on all counts and found Mr. Pimental not guilty of conspiracy and all but two counts of mail fraud. *Id.* at 583.

Following trial, the district court granted Mr. Pimental's Rule 29 motion for judgment of acquittal on the two counts of conviction. *Pimental*, 236 F. Supp. 2d at 101. It held there was insufficient evidence for the jury to have found that the two mailings on which the counts of conviction were based—mailings made by so-called "loss control" inspectors affiliated with the insurers, who had nothing to do with the administration, assessment, or collection of premium payments—were in furtherance of the alleged scheme. *Id.* at 109-10. Because of its ruling on the Rule 29 motion, the district court denied as moot Mr. Pimental's renewed motion to dismiss the indictment, which had been bolstered by developments at trial that brought to light the full extent of the government's Rule 6(e) violation. *Id.* at 112.

The First Circuit reversed the judgment of acquittal, finding that both mailings were "in furtherance" of the scheme to defraud. *Pimental*, 380 F.3d at 586-89. The First Circuit further held, in an issue not briefed or orally argued because the government conceded on appeal that it had violated Rule 6(e), that no Rule 6(e) violation had occurred. *Id.* at 591.

The district court had subject matter jurisdiction over the case because the indictment charged Mr. Pimental with an offense against the United States. *See* 18 U.S.C. § 3231. This Court has jurisdiction over Mr. Pimental's appeal pursuant to 28 U.S.C. § 1254.

B. The Insurance Fraud Bureau's Investigative Role and Litigation of the Rule 6(e) Issue

For several years, the United States Attorney for the District of Massachusetts has engaged in a practice of disclosing secret grand jury materials to IFB personnel, purportedly pursuant to the "government personnel" exception to the grand jury secrecy rules. *Pimental*, 236 F. Supp. 2d at 103. Although the IFB was created by state statute, *see* 1996 Mass. Acts 427, § 13, the Supreme Judicial Court of Massachusetts has described the IFB in unequivocal terms as a "private investigative agency." *In re Ellis*, 680 N.E.2d 1154, 1160 (Mass. 1997). *See also Adams v. Liberty Mutual Ins. Co.*, 799 N.E.2d 130, 134 n.7 (Mass. App. Ct. 2003) (describing IFB as "not a State agency but a private entity"). It is operated and controlled by two private voluntary associations of Massachusetts insurance carriers, the Automobile Insurance Bureau of Massachusetts ("AIB") and the Workers Compensation Rating and Inspection Bureau ("WCRIB"), which make up a majority of the IFB board and provide 100% of the funding for IFB. *See United States v. Pimental*, 199 F.R.D. 28, 33 (D. Mass. 2001). If an IFB investigation reveals that an "insurance transaction may be fraudulent," then the IFB's executive director must "refer the matter to the [Massachusetts] attorney general, the appropriate district attorney, or the United States attorney." *See* 1996 Mass. Acts 427, § 13(h).

Here, the IFB performed a preliminary investigation of Mr. Pimental's company and referred the case to the United States Attorney for the District of Massachusetts. *Pimental*, 199 F.R.D. at 29. The U.S. Attorney pursued the referral, and filed an *ex parte* motion for leave to disclose grand jury materials to IFB personnel pursuant to the "government personnel" exception codified at Fed. R. Crim. P. 6(e)(3)(A)(ii). *Id.* at 30. The motion was made "pursuant" to the "government personnel" exception, even though the exception, unlike other grand jury secrecy exceptions codified under Fed. R. Crim. P. 6(e)(3)(E), has no provision requiring judicial approval as a condition to disclosure. In the motion, the government stated, "[a]s insurance fraud experts deemed necessary by . . . the government to assist in the federal investigation, [IFB] investigators are 'government personnel' within the meaning of Rule 6(e)(3)(A)(ii)." *Id.* at 36 n.15. In short, the government based its motion on the alleged "expertise" of IFB employees, and not on the nature of the IFB as a public or private entity. An emergency district judge summarily granted the government's motion by signing a form order prepared by the government. *See United States v. Pimental*, 204 F.R.D. 223, 225 (D. Mass. 2001).

Following the allowance of the U.S. Attorney's motion, an IFB investigator assumed the role of lead "case agent" in the investigation. The IFB investigator interviewed dozens of witnesses, reviewed records obtained by grand jury subpoena, and testified before the grand jury about all issues of the case, outlining the results of his investigation. His testimony encompassed well over half of the total pages of the transcript of grand jury testimony. *Id.* at 225 n. 3. He summarized subpoenaed bank records to the grand jury, both orally and in the form of a spread sheet that was the basis for the indictment. *Id.* at 225. Based largely on the strength of the IFB investigator's testimony, Mr. and Mrs. Pimental were indicted for 14 counts of mail fraud and one count of conspiracy. *See Pimental*, 236 F. Supp. 2d at 103.

After learning through discovery of the IFB's substantial involvement in the grand jury proceedings and its receipt of grand jury materials, the Pimentals moved to dismiss the indictment. In a series of pre-trial opinions, the district court ruled the government violated Rule 6(e) by disclosing secret grand jury materials to IFB employees. *Pimental*, 199 F.R.D. at 37. The district judge based her conclusion in part on the Massachusetts Supreme Judicial Court's characterization of the IFB as a "private investigative agency." *Id.* at 33 (quoting *In Re Ellis*, 680 N.E.2d at 1160). She noted that the First Circuit previously had described the IFB as a "quasi-governmental agency" in *In re Justices of the Superior Court*, 218 F.3d 11, 13 (1st Cir. 2000), but found that characterization immaterial to her conclusion, as "Rule 6(e)(3)(A)(ii) says nothing about 'quasi-governmental' personnel." *Pimental*, 199 F.R.D. at 33-34. She also noted that the legislative history of Rule 6(e)(3)(A)(ii) and precedent from other circuits supported her conclusion. Specifically, the district court relied on *United States v. Tager*, 638 F.2d 167, 170 (10th Cir. 1980), which the court found "materially indistinguishable" from this case. *Pimental*, 199 F.R.D. at 35. The court further noted that "the Tenth Circuit's reasoning [is] persuasive; it squarely addresses the four corners of the Rule 6(e) question in this case." *Id.* Just a few months after the district court's ruling in this case, another district judge in Massachusetts reached the same conclusion in a different case. *See In re Grand Jury Proceedings*, 158 F. Supp. 2d 96, 115, 118 (D. Mass. 2001) (Young, C.J.) (holding that disclosure of grand jury materials to IFB violates Rule 6(e) and finding *Tager* "almost factually equivalent").

The district court eventually concluded, several months before trial, that the Rule 6(e) violation was harmless because the violation had not substantially influenced the grand jury's decision to indict. *Pimental*, 204 F.R.D. at 228. *See also United States v. Pimental*, 201 F.R.D. 24 (D. Mass. 2001). After the extent of the violation became more apparent at trial, and the Pimentals renewed their motion to dismiss, the court indicated that her prior determination of harmlessness might be subject to revision.

C. The Evidence at Trial and The District Court's Entry of Judgment of Acquittal

The evidence at trial showed that under the Massachusetts workers' compensation system, insurers assess premiums on the basis of two factors: 1) an insured's estimated payroll and 2) the classification code for the type of work performed by the insured, which reflects the relative hazardousness of that work. *Pimental*, 236 F. Supp. 2d at 102. The government offered evidence of allegedly false representations made by the Pimentals regarding the nature of their company's work and the size of its payroll. The evidence at trial showed that Mr. Pimental's business consisted mostly of steel erection, decking, and welding, although he made representations that his work involved concrete construction. *Pimental*, 380 F.3d at 579. The evidence showed that concrete construction work was classified as less dangerous than steel erection, and that premium payments were accordingly less. *Id.*

The jury found Loretta Pimental not guilty on all counts and found Arthur Pimental not guilty on all but two mail fraud counts. One of the two counts of conviction, Count 2, was based on a 1994 mailing to the insurer of an "Account Data Report" prepared by Alexander & Schmidt ("A&S"), an independent contractor that provided outside "loss control" inspection services to multiple insurance companies. *Id.* at

586. *See also* App. J. The "Account Data Report" memorialized an August 1994 meeting in which Mr. Pimental described his business to an A&S employee as concrete construction. *Id.* at 580. There was no evidence that the A&S employee, William Brooks, identified himself to Mr. Pimental in the meeting as a representative of the insurance company (or of any company for that matter); stated the purpose of his visit; stated that he would be preparing a report; or stated that he would be mailing or otherwise transmitting a copy of any report to the insurer (or to anyone else). Mr. Brooks testified, moreover, that his focus was solely on the existence of a "safety program." D.App. 72. The government did not ask Mr. Brooks – or the President of A&S, who also testified – a single question about how the "Account Data Report" for Mr. Pimental, or such reports generally, were used. And the government presented no evidence from any insurance company witness as to any connection whatever between the insurer's "loss control" function and any other aspect of its business. In sum, there was no evidence that Mr. Brooks' meeting with Mr. Pimental had anything to do with the classification of his business, with payroll, or with anything else related to insurance premiums or the allegations in the indictment.

The other count of conviction, Count 4, also was based on a mailing by a "loss control" inspector. *Pimental*, 380 F.3d. at 583. This letter, dated October 5, 1995, and signed by the insurer's "Senior Loss Control Consultant," Timothy Bergeron, was mailed *to Mr. Pimental* from the insurer's regional office. *Id.* at 581, 583. *See also* App. L. The letter memorializes a meeting that Mr. Bergeron and Mr. Pimental had two weeks earlier – on September 21, 1995 – and states that "[t]he basic objective of our surveys is to assist policyholders with identification and control of loss potentials." App. L. Mr. Bergeron's testimony confirmed that the insurer's loss control services were designed not to determine premiums but rather to assist policyholders on safety matters. He described his job as "working with [insureds] to help prevent injuries and accidents that are occupationally related." D.App.56. Mr. Bergeron testified that the purpose of his October 5 letter was to "provide [Mr. Pimental] a contact in the event that they needed some assistance from a safety perspective." *Id.* As with Mr. Brooks, the government did not ask Mr. Bergeron whether he ever had any contact with insurance company personnel that assessed premiums or investigated fraud or whether any reports he prepared would be used in connection with those parts of the insurer's business. D.App.56-69.

The district court granted Mr. Pimental's motion for judgment of acquittal on the two mail fraud convictions. The court held that the two mailings charged in Counts 2 and 4 "had nothing to do with the determination of premiums and played no role in perpetuating the charged scheme to defraud." *Pimental*, 236 F. Supp. 2d at 101. Accordingly, there was insufficient evidence as to the "in furtherance" requirement under the federal mail fraud statute, which requires that "the scheme's contemplation or the prevention of its detection *must have depended* in some way on the mailing." *Id.* at 108 (emphasis added).

As a result of the judgment of acquittal, the district court denied as moot Mr. Pimental's renewed motion to dismiss the indictment based on the Rule 6(e) violation. However, the district court indicated that facts that emerged at trial potentially altered her view that the violation was harmless. She explained that "if the jury trial's full airing of the issues reveals, for the first time, the full scope and effect of the violation, and—as is arguably the case here—that new information warrants a finding, under *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988)], that the violation substantially influenced the *decision to indict* and not merely the *composition of the indictment*, . . . to deny a remedy to a defendant would be unjust and unwarranted." *Pimental*, 236 F. Supp. 2d at 112 (emphasis in original).

D. The First Circuit Reverses the District Court on the Two Mail Fraud Convictions and Rules that the Government Did Not Violate Rule 6(e).

The government appealed from the grant of Mr. Pimental's motion for judgment of acquittal, and Mr. Pimental cross-appealed from the denial of the motion to dismiss the indictment. The government did not dispute, for purposes of appeal, that it had violated Rule 6(e) by disclosing secret grand jury material to IFB employees, but instead argued that the violation was harmless. Accordingly, the parties did not brief the issue of whether a Rule 6(e) violation had occurred, and the issue was not argued orally. Notwithstanding the lack of briefing or argument on this issue, in an issue of first impression, the First Circuit held that no Rule 6(e) violation occurred because IFB investigators are—or were in this context—"government personnel" within the meaning of Rule 6(e). *Pimental*, 380 F.3d at 596. The First Circuit failed to cite or otherwise acknowledge the Supreme Judicial Court's characterization of the IFB as a "private investigative agency." Holding that neither precedent nor the text of Rule 6(e) provided an answer to whether IFB employees were "government personnel," the First Circuit turned to Rule 6(e)'s legislative history, in which it discerned two "themes" that led to its conclusion. First, it determined that a "key purpose" of the rule was "to facilitate cooperation between federal prosecutors and state personnel," and that such purpose would be advanced by allowing disclosure to the IFB. *Id.* at 595. Second, the Court noted that "a primary safeguard for protecting the countervailing interest in the secrecy of grand jury proceedings is the requirement that such disclosure must be necessary for the enforcement of criminal law." *Id.*

Despite the absence of any judicial approval mechanism under Rule 6(e)(3)(A)(ii), the First Circuit also held that the U.S. Attorney "must seek court authorization where quasi-governmental agencies such as the IFB are involved and make a functional showing that the individual involved is within the Rule." *Id.* at 596. The court did not attempt to explain the source of its authority to engraft a judicial approval requirement on Rule 6(e), nor did it flesh out the nature of the required "functional showing."

The First Circuit also reversed the district court's judgment of acquittal on the two mail fraud convictions. Purporting to rely on *Schmuck v. United States*, 489 U.S. 705 (1989), the court observed that "mailings that help maintain a harmonious relationship between the perpetrator and the victim" satisfy the "in furtherance" requirement of the mail fraud statute, provided that they "help [] to ensure [the scheme's] continued success in the future." *Pimental*, 380 F.3d at 586. Under this loose formulation, the court concluded that a rational jury could have found that both of the mailings were sufficient inasmuch as they "helped Pimental maintain his ongoing fraudulent venture." *Id.* at 586.

REASONS FOR GRANTING THE PETITION

The First Circuit's conclusion that IFB employees are "government personnel" to whom secret grand jury materials may be disclosed is inconsistent with long-standing Supreme Court precedent holding that Rule 6(e)'s exceptions should be narrowly construed, *United States v. Sells Engineering*, 463 U.S. 418, 425 (1983) ("In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of [grand jury] secrecy has been authorized."); with an authoritative decision of the Tenth Circuit, *United States v. Tager*, 638 F.2d 167, 168 (10th Cir. 1980) (government personnel exception does not apply to investigator who did not hold "any official position whatever" with the government); and with Massachusetts law characterizing the IFB as a private organization. *See In re Ellis*, 680 N.E.2d 1154, 1160 (Mass. 1999) (IFB is "private investigative agency").

The First Circuit's decision is also a dangerous precedent, both within the circuit and elsewhere, given the growing trend of cooperation between the government and private or hybrid investigative entities. The judicial approval mechanism that the First Circuit engrafts onto Rule 6(e) as a condition of disclosure will not limit the erosion of grand jury secrecy. Furthermore, the requirement reflects a wholly unauthorized exercise of the court's supervisory powers.

The First Circuit's decision on the mail fraud issue is also inconsistent with this Court's precedents. Its holding – that mailings that the jury might find are merely "helpful" to maintaining harmony between the perpetrator and victim are sufficient – impermissibly expands *Schmuck's* already loose interpretation of the "in furtherance" requirement. Perhaps because of its toothless formulation, the First Circuit compounded its error by holding that the jury could have found a sufficient connection between the charged mailings and the scheme even though such a connection was entirely speculative. This misapplication of *Schmuck*, which is not unique among federal courts of appeals, effectively reduces the mailing requirement under the mail fraud statute to a mere "jurisdictional hook," contrary to this Court's precedent. *See United States* v. *Maze*, 414 U.S. 395, 405 (1974) ("Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this . . .").

A. The First Circuit's Decision Conflicts With Supreme Court Precedent, a Tenth Circuit Decision, and Massachusetts Law.

This Court has long protected the secrecy of grand jury proceedings and has narrowly interpreted 6(e)'s exceptions. In *Sells Engineering*, for example, the Court stated "both Congress and this Court have consistently stood ready to defend [grand jury secrecy] against unwarranted intrusion. In the absence of a *clear indication* in a statute or Rule, we must always be reluctant to conclude that a breach of this secrecy has been authorized." 463 U.S. at 425 (emphasis added). *See also Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979) ("Courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury."); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (the "indispensable secrecy of grand jury proceedings . . . must not be broken except where there is a compelling necessity"). Because the term "government personnel" in Rule 6(e) is categorical, the undisputed status of the IFB as, at most, a "hybrid" entity—whether "quasi private" or "quasi governmental"—should be dispositive. Even employees of a "quasi governmental" entity are not "government personnel." As the district court put it, "the text of Rule 6(a)(3)(A)(ii) says nothing about 'quasi governmental' personnel." *Pimental*, 189 F.R.D. at 34. Thus, at a minimum, Rule 6(e)(3)(A)(ii) does not "clearly indicate" that disclosure to hybrid or quasi-governmental entities is authorized, and that should be the end of the analysis.

The district court below and other federal courts, including the Court of Appeals for the Tenth Circuit, have faithfully applied this Court's precedent in construing the "government personnel" exception. In *Tager*, the Tenth Circuit held that disclosure of secret grand jury materials to an investigator employed by a private investigative organization, the Insurance Crime Prevention Institute ("ICPI"), was not authorized under the "government personnel" exception because the investigator did not hold "any official position whatever." 638 F.2d at 168-69. In reaching this conclusion, the court noted this Court's admonitions in *Douglas Oil* and *Procter & Gamble*, *supra*, about unnecessary expansion of grand jury secrecy exceptions. *Id.* at 168, 170-71. With regard to the exception's legislative history, *Tager* noted that "the drafters of (A)(ii) considered whether the assistance of private persons like [the ICPI investigator] should be included. They decided against such inclusion by limiting (A)(ii) to 'government personnel.'" *Id.* at 170.

Although the First Circuit found that *Tager* "has very little to do with this case," *Pimental*, 380 F.3d at 594 n.12, because the court's holding is arguably based on another 6(e) exception,[2] the reasoning of *Tager*—that one must have a position in the government to fall within the "government personnel" exception—is consistent with the language of Rule 6(e) and with the Supreme Court's teachings regarding exceptions to the grand jury secrecy rules. For these reasons, the district court held that the facts of *Tager* were "materially indistinguishable from those here." *Pimental*, 199 F.R.D. at 35. *See also In re Grand Jury Proceedings*, 158 F. Supp. 2d at 115 (concluding *Tager* "almost factually equivalent" to case involving disclosure to IFB employees). And other district courts have similarly acknowledged that the "government personnel" exception does not apply to individuals outside the government. *See, e.g., In re November 1992 Special Grand Jury*, 836 F. Supp. 615, 617 (N.D. Ind. 1993) ("Congress did not include non-governmental employees when it crafted the sub-section (A)(ii) exceptions to non-disclosure of grand jury materials."); *In re Disclosure of Grand Jury Material*, 645 F. Supp. 76, 79 (N.D. W. Va. 1986) (government personnel exception does not authorize disclosure to private auditor assisting prosecution). In one case, the government even conceded that an employee of the ICPI, the same private anti-fraud organization at issue in *Tager*, was not within the government personnel exception. *United States v. Rosenfield*, 780 F.2d 10, 11 (3d Cir. 1985).

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[2] In *Tager*, the government moved to disclose grand jury information to the ICPI investigator under then Rule 6(e)(2)(C)(i) (now at Rule 6(e)(3)(E)(i)), which permitted disclosure by court order "preliminarily to or in connection with a judicial proceeding." 638 F.2d at 168-69. In holding that disclosure was not authorized under that provision, the Tenth Circuit considered whether disclosure to the ICPI investigator was otherwise permissible under Rule 6(e), including under the "government personnel" exception. *Id.* at 169. The court unequivocally held that "subsection[] (A)(ii) [is] not applicable" to the ICPI investigator. *Id.* at 169. The First Circuit's dismissive treatment of *Tager* ignores the language and reasoning of that case.

Against this authority, the court below relied on "themes" in Rule 6(e)'s legislative history to support its contrary view. *Pimental*, 380 F.3d at 595. But recourse to legislative history is inappropriate where, as here, the language of the rule is clear, *see Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994) ("[w]e do not resort to legislative history to cloud a statutory text that is clear"), and where this Court has required a "clear indication" that disclosure is authorized. In any event, the legislative history confirms that the government personnel exception does not apply to quasi-governmental or to private entities. The legislative history is replete with examples limiting Rule 6(e) to public officials. As explained by the district courts in *Pimental* and in *In re Grand Jury Proceedings*, that legislative history demonstrates, among other things, that Congress was concerned not only with the use of grand jury materials but also with the identity of the recipient of the materials, and deliberately authorized disclosure only to "government personnel." *See Pimental*, 199 F.R.D. at 34; *In re Grand Jury Proceedings*, 158 F. Supp. 2d at 106-115. The First Circuit's conclusion to the contrary—that limiting disclosure to "government" personnel was not a "primary mechanism" for assuming grand jury secrecy, *Pimental*, 380 F.3d at 596—is simply at odds with this history.[3]

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[3] In hearings on the 1977 amendments, which added the "government personnel" language to Rule 6(e), the reporter to the Advisory Committee on Criminal Rules defended the "government personnel" limit:

> *Mr. Mann*:. . . [T]he rule seems to restrict to other government personnel the experts—and I will use that

Finally, the First Circuit's decision also conflicts with Massachusetts law. Massachusetts courts have consistently described the IFB as a private entity. *See, e.g., In re Ellis*, 680 N.E.2d at 1160 (describing IFB as a "private investigative agency"); *Adams v. Liberty Mutual Ins. Co.*, 799 N.E.2d 130, 134 n.7 (Mass. App. Ct. 2003) ("The insurance fraud bureau of Massachusetts is not a State agency but a private entity."). Here, although the First Circuit purported to defer to Massachusetts law, *Pimental*, 380 F.3d at 596 ("Massachusetts has given the hybrid private/public IFB significant powers and responsibilities."), it failed to defer to or even to acknowledge the Supreme Judicial Court's characterization of the IFB in *Ellis* as a "private investigative agency." The Court ignored, in short, the settled principle that federal courts, even where applying federal law, should defer to state law interpretations of the nature of state-created entities or interests. *See McMillian v. Monroe Cty., Ala.*, 520 U.S. 781, 786 (1997) (deferring to state supreme court's interpretation to determine if sheriff acted as agent of state or county for purposes of applying 42 U.S.C. § 1983). *See also Phillips v. Washington Legal Found.*, 524 U.S. 156, 167

> term loosely—that the attorney for the Government may call upon. We have a pretty big Government with a lot of experts, but on certain matters there may not be a governmental employee who is expert in that field. Is it your intention not to permit the prosecutor to call in an astrologer or astronomer, for example?
>
> *Professor LaFave*: Yes, that is correct. Apparently representatives of the Justice Department whom we talked to about this particular problem did not seem to think that was a problem, in other words, that there was an occasion when they would need an expert and couldn't find the astrologer some place in the Federal Government. Apparently that is not the problem.

Proposed Amendments to the Fed. R. of Crim. P.: Hearings Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary, 95th Cong. 29-30, 92 (1977).

(1998) (deferring to state court's definitions of property interests to determine whether interest income was "private property" under federal Takings Clause).

In holding that IFB employees can fall within the "government personnel" exception, the First Circuit relied on several characteristics of the IFB that purportedly demonstrate the "governmental" side of its "hybrid" nature. *Pimental*, 380 F.3d at 592-94. All of these characteristics were well known, of course, to the Massachusetts courts that have consistently characterized the IFB as "private." The characteristics the First Circuit found compelling, moreover, apply to a broad range of private entities. For example, the court compared the IFB to a state bar association, which is considered a state actor for "state action" purposes, because both organizations collect mandatory dues from private individuals or organizations that are akin to a "state-mandated tax." *Id.* at 593. Whether an individual is a state actor for constitutional purposes, however, can hardly be the standard on which Rule 6(e)'s "government personnel" exception is judged, given the broad range of purely private entities that have been found to be state actors in certain contexts.[4] The court also noted the IFB's access to certain state records, including criminal records, that are not normally available to private entities. *Id.* at 593 (citing 1996 Mass. Acts 427, §§ 13(d), (e)). But many purely private entities, such as long-term care facilities and children's camps, also have access to such materials. *See, e.g.*, MASS. GEN. LAW ch. 6 §§ 172E,

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[4] *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 298 (2001) (not-for-profit corporation that oversaw public and private high school sports is state actor when using preemptory challenges); *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991) (private company state actor when using preemptory challenges); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982) (private oil supplier is state actor); *Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948) (private land owners are state actors when enforcing restrictive covenant).

172G. The court also explained that the IFB is "subject to the constant oversight of the Massachusetts legislature, to which the IFB must submit a report every six months." *Pimental*, 380 F.3d at 593 (citing 1996 Mass. Acts 427, § 13(j)). Again, many purely private entities must submit reports to the state and are subject to "state oversight," in this minimal sense, including charities and even private corporations.[5] In short, none of these characteristics mark the IFB as significantly "governmental" in nature under Massachusetts law.

B. The First Circuit's Decision Is A Dangerous Precedent, Given the Growing National Trend of Privately Assisted Law Enforcement.

In light of the First Circuit's decision, the practice of the U.S. Attorney in Massachusetts to disclose secret grand jury information to the IFB will presumably continue. But the threat to grand jury secrecy raised by the decision extends beyond Massachusetts and beyond the insurance industry. For example, like the IFB, the Pennsylvania Insurance Fraud Prevention Authority is wholly funded by private entities, and a majority of the board consists of private individuals. PA. CONS. STAT. § 325.21. Similarly, in many states, private insurance entities provide 100% of the funding for that state's fraud bureau. *See, e.g.*, ARIZ. REV. STAT. § 20-466(G) (2004); CAL. INS. CODE § 1872.8 (2004); DEL. CODE ANN. TIT. 18, § 2415 (2004); NEB. REV. STAT. § 44-6606(8)(A), (B) (2004); NEV. REV. STAT. § 679B.700(4) (2004); N.M. STAT. ANN. § 59A-16C-14 (2004); S.D. CODIFIED LAWS § 58-4A-14 (2004); VA. CODE ANN. § 38.2-415(A) (2004). The desirable efficiencies of federal-state cooperation in combating insurance fraud that are touted by the First Circuit, *Pimental*, 380 F.3d at 596, may inspire other U.S. Attorneys to seek to share grand jury materials with state fraud bureaus as well, emboldened by the court's decision, even though their employees may not be purely "government personnel."

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[5] *See, e.g.*, MASS. GEN. LAWS ch. 12 §§ 8E, 8F, 8L (charitable trusts must register with the Attorney Generals office, submit written financial reports to his office, and keep accurate records for inspection by his office); MASS. GEN. LAWS ch. 56 § 11 (every corporation incorporated in the Commonwealth must file articles of organization and agreement of association with the Secretary of the Commonwealth, subject to his approval).

Similarly, industry associations in other fields are increasingly offering to assist with government investigation and prosecution. For example, the National Health Care Anti-Fraud Association ("NHCAA"), an organization of private health insurers and federal and state law enforcement, has a charge similar to that of the IFB: to "serv[e] as a national resource for health care anti-fraud information and professional assistance to government, industry and the media" and "[to] recogniz[e] and advanc[e] professional specialization in the detection and investigation and/or prosecution of health care fraud through accreditation of health care anti-fraud professionals." "NHCAA Mission Statement," *available at* www.nhcaa.org. In furtherance of its goal to assist with the prosecution of health care fraud, the NHCAA operates a database "to share information on health care fraud and possibly combine investigative cases in order to make them prosecutable at the federal level." *See GAO Rep. to the Banking Minority Member, Subcomm. on Nat'l Sec., Int'l Affairs and Crim. Justice, House Comm. on Gov't Reform and Oversight*, "Health Care Fraud; Information-Sharing Proposals to Improve Enforcement Efforts," 34 (May 1996) (*available at* www.securitymanagement.com/library/000187).

While public-private cooperation in the investigation and prosecution of federal crimes may be desirable, any circumvention of the rule of grand jury secrecy threatens Supreme Court precedent and important policy considerations regarding the secret nature of grand jury proceedings. As the district court in this case cautioned, "by broadening the meaning of 'government personnel' to include non-governmental experts who remain outside the control and direction of the government, the government vitiates the 'rule' of grand jury secrecy." *Pimental*, 199 F.R.D. at 34. The First Circuit's opinion opens the door to allow disclosure of secret grand jury information to these types of private or quasi-government entities as well.

C. The First Circuit's Engrafting of a Judicial Approval Mechanism onto Rule 6(e)(3)(A)(ii) Does Not Lessen the Threat to Grand Jury Secrecy, and is a Wholly Unauthorized Exercise of the Court's Supervisory Powers.

Unlike other exceptions codified in Rule 6(e)(3)(E), the "government personnel" exception codified at Rule 6(e)(3)(A)(ii) provides no mechanism for judicial approval.[6] Ignoring this structure, the First Circuit held that the U.S. Attorney does not have "self-executing powers" to make disclosures under the exception, and should continue his practice of seeking court authorization when it wishes to disclose secret grand jury materials to the employees of the IFB or other "quasi-governmental agencies." *Pimental*, 380 F.3d at 596. In seeking such court authorization, the U.S. Attorney must "make a functional showing that the individual involved is within the rule." *Id.* The First Circuit acknowledged that IFB personnel are not entitled to disclosure simply "as a matter of status," and instructed that approval shall be given on "a case-by-case basis." *Id.*

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[6] Rule 6(e)(3)(A) begins, "Disclosure of a grand-jury matter . . . may be made to . . . ." Three subsections follow, including the "government personnel" subsection. By contrast, the exceptions in Rule 6(e)(3)(E) are preceded by, "The court may authorize disclosure . . . of a grand-jury matter." Because of the "self-executing" nature of the Rule 6(3)(A)(ii) exception, both the district court below and another district judge, who are familiar with the U.S. Attorney's practices in dealing with the district courts under Rule 6(e), described the U.S. Attorney's practice of seeking court approval for disclosure to the IFB "not as a valid effort to comply with that rule, but rather as an effort to acquire 'a little cover' as [it] pursues its investigatory responsibilities in conjunction with [IFB] employees." *In Re Grand Jury Proceedings*, 158 F. Supp. 2d at 98 (quotations omitted); *accord Pimental*, 199 F.R.D. at 34 n.8.

Although the court purported to root its decision in the specific facts of this case, the only "showing" the government made in its motion here was a general description of the IFB and an explanation of the types of activities in which the assistance of IFB "investigators and data analysts" would be helpful—*e.g.*, by providing "expertise" on the insurance industry. It is unclear how this amounted to a "functional showing" that these IFB employees were "within the rule," as there was virtually no discussion of (a) the responsibilities of these employees within IFB, (b) the different responsibilities assigned to "investigators" as opposed to "data analysts," or (c) how IFB employees would interact with law enforcement personnel.

Indeed it would appear that such a "showing" could be made whenever the U.S. Attorney thought quasi-government personnel could be of assistance. It is even unclear if the necessary showing requires a demonstration of even "quasi" governmental status. For example, the First Circuit appears to contemplate the possibility of an entity being "considered governmental [under Rule 6(e)] for a particular purpose despite the fact that it is both controlled and financed by private individuals." *Pimental*, 380 F.3d at 592. In short, the judicial approval requirement created by the court will not serve to protect grand jury secrecy.

The First Circuit did not indicate the source of its authority to engraft a judicial approval requirement onto the Rule. It is most unlikely that Congress intended such a requirement, as it would have had no trouble including language in Rule 6(e)(3)(A)(ii) that mimics its neighbor Rule 6(e)(3)(E), which covers court-authorized disclosures. Nor could such authority derive from the Court's supervisory powers, which are limited. *See Thomas v. Arn*, 474 U.S. 140, 148 (1985) ("Even a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with statutory provisions.") The Supreme Court has specifically held that a court cannot use its supervisory powers to regulate grand jury practice, even where it does so in connection with the regulation of professional ethics. *See United States v. Williams*, 504 U.S. 36, 55 (1992) (holding that Tenth Circuit's rule requiring prosecutor to disclose exculpatory material to grand jury not authorized by court's "supervisory powers"). While the judicial approval mechanism the First Circuit adopts here may be a less substantial intrusion on the grand jury's historic role than the rule at issue in *Williams*, the First Circuit's new rule is not based on any ethical concerns and is thus even further afield from the traditional objects of a permissible exercise of supervisory powers.

D. The First Circuit's Reversal of the Entry of Judgment of Acquittal Mail Fraud Counts Rests on a Misinterpretation of *Schmuck*, and is Representative of the Courts of Appeals' Improper Reduction of the Mailing Element to a Mere Jurisdictional Prerequisite.

1. The First Circuit Misapplied Schmuck.

The mail fraud statute criminalizes the use of the mails "for the purpose of executing" a scheme or artifice to defraud. 18 U.S.C. § 1341. The statutory requirement that charged mailings be made with this purpose, referred to by the court below as the "in furtherance of" element, last received attention from this Court in 1989. *United States v. Schmuck*, 489 U.S. 705, 710-15 (1989). *Schmuck* confirmed that "[t]he mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Id.* at 710 (quoting *Kann v. United States*, 323 U.S. 88, 95 (1944)).

The mailings at issue in *Schmuck* were made by car dealers who had bought from the defendant (Schmuck) used cars, on which the defendant had "rolled back" the odometers, thus falsely inflating the cars' value. *Id.* at 707. The mailings charged in the indictment were title application forms that the dealers mailed to the Wisconsin Department of Transportation in connection with obtaining title for the retail customers to whom the dealers resold the used cars they received from Schmuck. *Id.* This Court found those mailings to be "in furtherance" of *Schmuck*'s "ongoing" scheme because "[a] rational jury could have found that the success of Schmuck's venture *depended on* his continued harmonious relations with, and good reputation among, retail dealers, which in turn *required* the smooth flow of cars from the dealers to their Wisconsin customers." *Id.* at 711-12. (emphasis added). In reaching this conclusion, the Court emphasized that the mailings were *essential* or *necessary* to the scheme (or so the jury could have found). It noted, "Schmuck's scheme would have come to an abrupt halt if the dealers either lost faith in Schmuck or had not been able to resell the cars obtained from him." *Id.* at 712. It described the mailed forms as "*necessary* to the passage of title, which in turn was *essential* to the perpetration of Schmuck's scheme." *Id.* (emphasis added). And it emphasized that the resales to consumers "naturally *depended* on the successful passage of title." *Id.* (emphasis added).

The First Circuit's formulation of the "in furtherance" element here forsakes the language of "dependency" and "necessity" that was central to *Schmuck*. By contrast, the court held that "mailings that help maintain a harmonious relationship between the perpetrator and the victim" satisfy the "in furtherance" requirement of the mail fraud statute, provided that they "help [] to ensure [the scheme's] continued success in the future." *Pimental*, 380 F.3d at 586. Under the loose standard of "helpfulness," the court concluded that both of the mailings on which the two counts of conviction were sufficient, simply because they "helped Pimental maintain his ongoing fraudulent venture." *Pimental*, 380 F.3d. at 586.

The First Circuit's formulation, which allows a mail fraud conviction to be sustained simply because a rational jury could have found that the mailings were "helpful" to maintaining harmony between perpetrator and victim, ignores the principles set forth in *Schmuck*. *Schmuck* makes clear that "helpfulness" is not enough – that innocent third party mailings can only satisfy the "in furtherance" requirement where the scheme, in at least some way, depends for its success on the mailings. The First Circuit's observation that the *Schmuck* mailings were sufficient simply "because they contributed to [the scheme's] overall success by making it more likely that dealers would come back to *Schmuck* to purchase more cars," *id.* at 586, ignores this principle, and reflects a fundamental misreading of *Schmuck*.[7]

In addition to its lack of fidelity to *Schmuck*, the First Circuit's decision also runs afoul of Rule 29 of the Federal

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[7] Ironically, the court effectively disavowed one of its own precedents that more accurately captured the rule in *Schmuck*. *See United States v. Pacheco-Ortiz*, 889 F.2d 301, 305 (1st Cir. 1989) ("[T]he scheme's contemplation or the prevention of its detection must have depended in some way on the mailing."). The district court explicitly relied on *Pacheco-Ortiz's* vocabulary of "dependency" in holding that the mailings were insufficient to sustain the conviction. *Pimental*, 236 F. Supp. 2d at 101. The First Circuit admonished the district court for taking this language seriously, *Pimental*, 380 F.3d at 587, although it acknowledged in a footnote that "the flexibility of the English language is one of its wonders; that flexibility can lead to misunderstandings." *Id.* at 587 n.5. The court proceeded to state that "depend," in addition to its ordinary meaning of a "necessary condition, can also mean 'to have a connection or a relationship as a subordinate part or appurtenance.'" *Id.* at 587 n.5 (citing *Webster's Third New International Dictionary* 604 (1993)). As explained below, this linguistic flexibility seems to have influenced not only the court's formulation of the legal standard but also its conclusion as to the sufficiency of the evidence.

Rules of Criminal Procedure, which requires a court to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." This is evident in the Court's strained reading of the record to support the jury's verdict. As to the loss-control report mailed by Brooks to the insurer in August, 1994, the Court noted that this mailing:

> helped Pimental maintain his ongoing fraudulent venture by insuring that he continued to receive insurance coverage. The jury was entitled to conclude that had Brooks never mailed his loss-control report, Hartford Insurance would have terminated its insurance coverage and Pimental's scheme would have, at least temporarily, come to a halt. Indeed, Pimental's policy with Hartford Insurance was threatened with cancellation when he attempted to avoid a loss-control interview in the summer of 1995 by ignoring repeated inquiries from Bergeron. If Hartford Insurance were not to receive a completed loss-control report, Bergeron's letter warned, Pimental's insurance coverage would be 'subject . . . to cancellation.'

Id. at 586. This analysis, presumably infected by the watered-down standard of "helpfulness," is precisely the sort of "speculative" interpretation of the evidence that Rule 29 forbids. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.")

Most important, the court glosses over a key fact: the "threatening" letter from Bergeron upon which its evidentiary interpretation rests was not sent to Mr. Pimental until a full year *after* the August 1994 meeting with Mr. Brooks that is memorialized in the Count 2 mailing. The Court also ignores compelling evidentiary reasons cutting against the significance it attaches to Bergeron's 1995 letter. For example, there was no evidence that Pimental received the letter, read the letter, or discussed its contents with Bergeron. Bergeron provided no testimony whatever about the threat of cancellation, moreover, and he characterized the "threatening" letter as a "form letter." D.App. 36-37. In short, there was no basis for a rational jury to conclude that Mr. Pimental believed the August 4, 1994, meeting with Mr. Brooks was essential to the scheme.[8]

The court's analysis of the mailing charged in Count 4—the October 5, 1995 letter sent by loss-control inspector Bergeron to Mr. Pimental himself—was similarly defective. The court even acknowledged some difficulty in analyzing how a mailing sent *to the defendant* could be made "for the purpose of executing" a scheme to defraud. It stated, as to Count 4, that "[t]he harder question is why a letter *to Pimental*, recounting his fraudulent statements, was in furtherance of the fraud." *Pimental*, 380 F.3d at 589 (emphasis in original). The court provided the following two responses to its question:

> One is that Pimental now knew that his deception of the inspector was successful—his copy showed that his lies were being sent to the company records. This could only

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[8] As an alternative ground for its holding as to the Count 2 mailing, the Court ruled that "the jury would have been entitled to conclude that Pimental's scheme depended on Brooks's mailing." *Pimental*, 380 F.3d at 588. This conclusion, which is admittedly more faithful to *Schmuck*, rests on the same speculative interpretation of the evidence explained above. The court's conclusion that "there was significant evidence that Hartford Insurance would have cancelled the Pimentel's coverage" if Mr. Pimental had not met with Mr. Brooks, *id.*, is simply unsupportable.

> encourage him in the scheme. Further, there was an obvious purpose to Bergeron sending a summary of his report to Pimental—it allowed Pimental to correct any inaccurate information on the report. Pimental chose not to correct the misinformation, thus perpetuating the fraud and demonstrating further his fraudulent intent.

Id. at 589. This analysis is defective as a matter of law. The First Circuit cited no Supreme Court authority for the proposition that a mailing may have "encouraged" the perpetrator was sufficient to satisfy the "in furtherance" requirement under the mail fraud statute. Although the court did acknowledge, by way of illustration, that sometimes mailings are sufficient that "lull the victim into a false sense of security," 380 F.3d at 587-88 (citing *United States v. Lane*, 474 U.S. 438, 451-52 (1986)), it did not explain how a mailing that, conversely, might encourage the perpetrator can sustain a conviction. And nothing in *Lane* or this Court's other "lulling" case, *United States v. Sampson*, 371 U.S. 75 (1962), suggests that such an "emboldening" letter, made not by the defendant but by the victim, can be construed as being made "for the purpose of executing" a scheme to defraud.

Apart from this legal error, the court also engaged in a wholly speculative interpretation of the evidence relevant to this mailing. Indeed the court cited no evidence—because there was none—from which the jury could have divined the "obvious purpose" that it attributes to Bergeron's mailing: "allow[ing] Pimental to correct any inaccurate information in the report." The letter itself does not ask for any confirmation of its substance from Pimental, and Bergeron did not testify that the letter had any such purpose. Indeed Bergeron testified that the purpose of the letter was something entirely different: "to provide [Mr. Pimental] with a point of contact in the event that they needed some assistance from a safety perspective." D.App. 65. Plainly, any conclusion by the jury that the purpose of Bergeron's letter was to allow Mr. Pimental to make corrections to it was purely speculative.

2. *The Court's Decision Reflects a Trend in the Courts of Appeals to Treat the Mailing Element As Only a Jurisdictional Prerequisite.*

This Court has held that the mailing requirement for mail fraud is more than a mere "jurisdictional hook," a proof requirement necessary simply as a basis for federal jurisdiction. As it explained in *Maze*, "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this . . . ." 414 U.S. at 405. *See also* 18 U.S.C. § 1341 (mailing must be made "for the purpose of executing" a scheme or artifice to defraud); *Schmuck*, 489 U.S. at 723 (Scalia, J., dissenting) ("[I]t is mail fraud, not mail and fraud, that incurs liability."). The First Circuit's decision below is inconsistent with this precedent, as it sustained convictions where the mailings were, at most, "related to" or made "in connection with" the fraudulent scheme.

Nor is the decision below the only circuit court case that has found mailings to be sufficient even where the generous standard of *Schmuck* has not been met. Numerous other decisions have affirmed mail fraud convictions even though the mailing is remote to the scheme, including cases where the mailing at most contributed to the scheme and where the charged mailing was made to the defendant himself. *See, e.g., United States v. Reyes*, 239 F.3d 722, 737 (5th Cir. 2001) (where defendant city councilman accepted bribes in exchange for supporting city contracts, thank you note from contractor *to defendant* was sufficient to support mail fraud conviction under *Schmuck*, as "[a] rational jury could conclude that an expression of appreciation by the man whose support [of a 'fictitious corporation' created by the FBI] was essential to the group's participation in the hotel project was a key step in the scheme to defraud."); *United States v. Swan*, 250 F.3d 495, 500 (7th Cir. 2001) (where defendant city employee set up "ghost jobs" for himself and others, and insurance company mailed payment to health care provider for medical services rendered to holder of ghost job, defendant's creation of ghost job was sufficient basis for mail fraud violation, as it furthered ability of job holder to get free medical care.); *United States v. Bortnovsky*, 879 F.2d 30, 39-40 (2d Cir. 1989) (letter from insurance adjuster *to defendant*, notifying him how to "preserve his right under the terms of the policy to recover the sum sought through a civil cause of action" was in furtherance of defendant's scheme to collect false insurance claims, "because it advised the defendants of another route by which they might recover the funds from the [insurer], the normal claims processing having proven unsuccessful.").

As Justice Frankfurter observed in *Parr* v. *United States*, 363 U.S. 370 (1960), "[t]he adequate degree of relationship between a mailing which occurs during the life of a scheme and the scheme is . . . not a matter susceptible of geometric determination." *Id.* at 397 (dissenting opinion). This observation was cited by the dissent in *Schmuck* as a reason why this Court should not expansively read its precedents in this area. But even though *Schmuck* itself has been criticized by commentators as reducing the mailing requirement to a mere jurisdictional prerequisite, *see, e.g.*, Peter J. Henning, *Maybe it Should Just be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 458 (1995), *Schmuck* at least required that the relationship between the mailing and some aspect of the scheme be one of dependence. That nexus did not exist here, and other courts have affirmed convictions where the requisite nexus is similarly absent.

Perhaps Congress will one day amend the mail fraud statute to require only that the mail be used "in connection" with the scheme to defraud, and the mailing requirement will be reduced to an analogue of the interstate commerce nexus required under other federal criminal statutes. *See, e.g., United States v. Elias*, 285 F.3d 183, 189 (2d Cir. 2002) (in Hobbs Act robbery prosecution, required effect on interstate commerce met where neighborhood grocery store purchased "beer and fruit" from out-of-state suppliers). Or perhaps Congress will eliminate the "in furtherance" requirement from the statute altogether, just as it has eliminated the requirement that the U.S. mail itself be used under the mail fraud statute. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087 (1994) (extending mail fraud's reach to parcels "sent or delivered by any private or commercial interstate carrier"). Congress has repeatedly demonstrated that it is ready, willing, and able to "correct" judicial interpretations of the mail fraud statute with which it disagrees. *See, e.g.,* 18 U.S.C. § 1346 (extending the "scheme" to defraud element of mail and wire fraud to cover deprivations of the intangible right of "honest services," in response to *McNally v. United States*, 483 U.S. 350 (1987)). Unless and until Congress takes such action, however, this Court should not allow the courts of appeals to achieve the same result by overly loose interpretations of the statutory command that mailings be "for the purpose" of executing the scheme to defraud.

CONCLUSION

For the reasons given above, Mr. Pimental's petition for writ of certiorari should be granted, so that this Court can resolve the split among the lower courts concerning the scope of Rule 6(e) and reaffirm the requirements of *Schmuck*.

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APPENDIX A

COURT OF APPEALS OPINION REINSTATING PETITIONER'S CONVICTION AND FINDING THAT THE GOVERNMENT DID NOT VIOLATE RULE 6(E)

UNITED STATES OF AMERICA, Appellant/Cross-Appellee, v. ARTHUR L. PIMENTAL, Defendant, Appellee/Cross-Appellant.

Nos. 03-1098, 03-1153

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

380 F.3d 575

August 30, 2004, Decided

PRIOR HISTORY: APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Nancy Gertner, U.S. District Judge. *United States v. Pimental, 236 F. Supp. 2d 99, 2002 U.S. Dist. LEXIS 24311 (D. Mass., 2002)*

JUDGES: Before Lynch, Circuit Judge, Rosenn, Senior Circuit Judge, * and Lipez, Circuit Judge.

* Of the Third Circuit Court of Appeals, sitting by designation.

OPINION: **[*578]** **LYNCH, Circuit Judge**. This workers' compensation insurance fraud criminal case produced an appeal from both sides. The government appeals the district court's dismissal of two counts on which a jury had convicted, while the defendant cross-appeals on the ground that the entire case should have been dismissed because of an alleged violation of the grand jury secrecy rule, embodied in *Fed. R. Crim. P. 6(e)*. We conclude, despite the able representation of Pimental, that (1) the district court erred in dismissing the two counts and we reinstate the jury convictions and conclude that (2) there was no violation by the prosecution here of *Rule 6(e)* at all. This second point is a matter of first impression.

After a jury convicted Arthur Pimental of two counts of mail fraud, the district court dismissed the convictions because it found that the two underlying mailings were not "in furtherance" of Pimental's fraudulent scheme. *United States v. Pimental, 236 F. Supp. 2d 99 (D. Mass. 2002)*. Pimental's scheme involved lying to various workers' compensation insurance company representatives about the nature and scope of his company's work; his false statements tended to reduce the premium payments he owed for workers' compensation insurance. The government appeals the district court's decision, arguing that the two mailings furthered Pimental's scheme by helping to ensure that the insurance company did not discover his earlier misrepresentations.

Pimental cross-appeals, arguing that his indictment should be dismissed because the prosecuting attorney disclosed secret grand jury materials to an investigator for the Massachusetts Insurance Fraud Bureau (IFB). Pimental argues that the rule allowing disclosure of grand jury materials **[*579]** to "government personnel" in certain circumstances, *Fed. R. Crim. P. 6(e)(3)(A)(ii)*, was inapplicable because the IFB investigator was a private actor. The IFB, which investigates potential cases of insurance fraud, is authorized and structured by

Massachusetts statute, but partially run and entirely funded by insurers.

We reverse the district court's dismissal of Pimental's convictions, finding that the mailings by insurance company representatives that formed the basis of the two counts of conviction were indeed in furtherance of Pimental's fraudulent scheme. Additionally, we reject Pimental's cross-appeal because we conclude that the first district court (not the trial court) did not err when it found the IFB investigators here are "government personnel" within the meaning of *Fed. R. Crim. P. 6(e)(3)(A)(ii)* and so authorized the prosecutor to reveal grand jury materials to them.

I. Factual Background

The facts are described in the light most favorable to the jury's guilty verdict.

Arthur Pimental and his wife, Loretta Pimental (for ease of reference we refer to her as Loretta and to Arthur as Pimental), owned and operated Pimental Steel Erectors ("Pimental Steel") starting sometime in the early 1980's. In late 1989, Pimental Steel allowed its workers' compensation insurance to lapse; this violated Massachusetts law. Massachusetts requires all employers to maintain workers' compensation insurance which covers their employees in the case of an on-the-job injury or job-related illness. *Mass. Gen. L. ch. 152, § 25A*. Over three years later, in April 1993, Arthur Pimental mailed a written application to the Massachusetts Workers' Compensation Rating and Inspection Bureau (MWCRIB) to resume Pimental Steel's workers' compensation coverage. MWCRIB, a private non-profit association of insurers that is licensed under Massachusetts law, *Mass. Gen. L. ch. 152. § 52C*, uses a risk pool to assign insurance companies to provide workers' compensation insurance on pre-set terms to applicant-employers. The fraud charges started here.

On the MWCRIB application form, Pimental described the operations of his business as involving "concrete construction including foundations" and added that it "puts in foundations." Concrete foundation work involves laying concrete and reinforcing it with steel rods and is also known as "rebar." MWCRIB processed the application, assigned it to the Hartford Fire Insurance Company ("Hartford Insurance"), and notified Pimental via the mail that the estimated premium for the year, based on his application, was $ 12,425.

Despite what was said in the MWCRIB application, Pimental Steel had never at any point been involved in concrete foundation work. Rather, throughout the relevant period, its business performed mainly steel erection and related work, such as welding and decking. Steel erection involves the placement of girders, columns, and joints to support a structure, then laying corrugated-metal decking for the ceiling and floors of the building and welding it into place. Steel erection work carries a significantly higher risk of injury than does concrete foundation work.

Because workers' compensation premiums are set based upon the kind of work performed and the amount of a business's payroll, Pimental's incorrect description on the MWCRIB application affected the premium payments Pimental Steel owed. In 1993, the premium payment for steel erection of structures over two stories was $ 99.35 per every hundred dollars of payroll[1] (reduced to $ 69.22 for structures under **[*580]** two stories), while the rate was $

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[1] All subsequent references to premium rates are per hundred dollars of payroll.

41.22 for concrete foundation work. Some of the work that Pimental Steel actually performed, however, had lower premium rates than concrete foundation work: the rate for decking was $ 24.66 or $ 19.82, depending on the type of metal used, while the rate for welding was $ 23.56. Where, as in the case of Pimental Steel, employees perform tasks that have different premium rates, the total premium cost can be calculated by parsing out the hours that employees spent on each different task, so long as appropriate documentation is maintained. One witness testified that 80% of the work Pimental Steel did for him was steel erection and decking and that the remaining 20% was "miscellaneous."

In September of 1993, Joseph F. Brugman, an auditor for Hartford Insurance, met with Loretta Pimental to perform an initial audit on Pimental Steel's insurance application. In addition to such initial audits, which are conducted at the start of an insurer's relationship with an insured, insurers normally perform audits once a year at the conclusion of each annual policy period. The auditors determine the insurance classification for the work that the insured's employees performed and the total amount of salary paid to them. Using this information, the insurance companies calculate the final amount that the employer owes for the year.

During the initial audit meeting, Loretta told Brugman that Pimental Steel was, as the MWCRIB application had represented, involved in concrete foundation work. She did not tell Brugman that Pimental Steel was involved in any way in steel erection, welding, or decking, even though Brugman explained to her that Pimental Steel's operations could be split into different classifications for insurance purposes. At the later year-end audit in July 1994, also conducted by Brugman, Loretta repeated this description of Pimental Steel's business operations.

Several months after Brugman conducted his year-end audit, William Brooks, a loss-control inspector for Hartford Insurance, met with Arthur Pimental. In contrast to auditors, the purpose of loss-control inspectors is not to verify the accuracy of the information given by policyholders, but instead to "assist[] policyholders in their efforts to control costly accidents and/or injuries." During that meeting Pimental once again represented, wrongly, that his business involved rebar. Pimental also told Brooks that he did not currently have any employees and that there were not any ongoing projects that Brooks could observe. This was also not true: Pimental paid an employee wages three days after his meeting with Brugman.

On October 5, 1994, Brooks mailed an "Account Data Report" to Hartford Insurance that summarized his meeting with Pimental. The letter began by stating that "the insured describes his business []as that of the installation of reenforcing bars and rods for floors and walls." Brooks's standard practice is to inform insureds that he will turn over a copy of his loss-control report to the insurance company, and that the company will inform the employer of any recommendations to improve worker safety. However, Brooks testified that he had no specific recollection of whether he had informed Pimental of this procedure during their meeting.

The Pimentals renewed their workers' compensation insurance coverage with Hartford Insurance in May 1995. Hartford sent them a letter detailing the terms of coverage; under the heading "Business of Named Insured," the letter read "concrete construction." In July 1995, Hartford auditor Mark Lawrence met with Loretta Pimental to conduct an audit of **[*581]** the May 1994 to May 1995 policy period. During that meeting, Lawrence asked Loretta if the company did any steel erection work, given that the company's name is "Pimental Steel Erectors." Loretta responded that the company only did concrete rebar work, and did not work on steel erection, despite its name.

Lawrence also asked Loretta for documentation of Pimental Steel's wage payments to employees. Loretta told Lawrence that there was no single record detailing payroll. Instead, she provided him with a checkbook that had been used to make payroll payments, along with a written summary of that checkbook, and told him that there were no additional records. From these documents, Lawrence calculated that Pimental Steel had paid $ 28,885 in salary to its employees for the year from May 1994 to May 1995, resulting in a total premium of $ 13,586. In fact, Pimental Steel's actual payroll during that period was $ 85,499, a figure which would have led to a larger premium. The Pimentals used non-sequentially numbered checks in their business and it appears that the single checkbook given to Lawrence contained only a fraction of all the checks written on behalf of Pimental Steel from the previous year.

In July 1995, Hartford Insurance attempted to arrange another loss-control meeting with Arthur Pimental. After Pimental did not respond to three separate inquiries, Timothy Bergeron, a Senior Loss-Control Consultant for Hartford Insurance, sent him a final letter stating that "failure to allow reasonable access for the purpose of loss-control consultation is a violation of the good faith provisions in the Workers' Compensation Insurance Plan and can subject your policy to cancellation." Under that threat of cancellation, Pimental finally met with Bergeron on September 21, 1995.

During the meeting, Pimental told Bergeron that Pimental Steel continued to perform rebar work; he falsely said the company did not perform any structural steel erection or metal deck work. He also falsely told Bergeron that there were currently no jobs in progress that could be inspected. His bank records reveal, however, that three employees were paid their wages that same day. During the meeting, Bergeron told Pimental that he was going to prepare a report summarizing their meeting and would mail it to Hartford Insurance. Bergeron testified that he told Pimental that he would send the loss-control report to Hartford Insurance, and Brooks indicated that it was his standard practice to tell the insured that the loss-control report would be forwarded to the insurance company. Bergeron kept a copy of the report in Hartford Insurance's Boston branch (where he was stationed) and sent a copy to the company's branch in San Antonio, Texas "that issues the policy and distributes all the policies regarding the assigned risk pool." On October 5, 1995, Bergeron also mailed a letter to Pimental summarizing their meeting and stating that "your company continues to bid work as a subcontractor installing reinforcement bar."

Pimental again renewed the company's workers' compensation insurance in May 1996, and Hartford Insurance again mailed a letter to Pimental detailing the coverage and repeating that the nature of the company's business was "concrete construction." Later that summer, Lawrence wrote a letter to the Pimentals requesting certain documents that were needed to perform a year-end audit for the May 1995-to-May 1996 coverage period. The Pimentals never provided Lawrence with any of the requested documentation.

When Lawrence met with Loretta Pimental for the annual audit on August 9, 1996, the only documentation that she provided **[*582]** was Pimental Steel's checkbook; she claimed to have been unaware of the records Lawrence had requested and to have lost the letter he had sent to her. As a result, Lawrence determined that Pimental Steel's account was "unauditable" and his report to Hartford Insurance simply estimated a payroll of $ 31,500 based on the checkbook that Loretta had provided. This estimate was less than 20% of Pimental Steel's actual payroll of $ 158,653 for that time period. Consequently, the $ 19,374 in premiums that the Pimentals were charged was also less than 20% of what they actually owed.

In November 1996, Arthur Pimental, perhaps concerned that Hartford Insurance might cancel Pimental Steel's policy for failure to provide requested documentation, submitted a second application for workers' compensation insurance to MWCRIB. This application contained a new name for the company; it was now called A.P.S. Products, Inc., rather than Pimental Steel Erectors. (We continue to refer to Pimental's company as "Pimental Steel" despite this name change). The application once again described the company's operations as "install steel for concrete reinforcement," and stated that its total payroll was $ 65,000 per year and that it employed only two workers. During the previous six months, the Pimentals' company actually paid salary to between four and seven employees on a weekly basis, and the company's payroll for those six months totaled approximately $ 83,000.

MWCRIB assigned the insurance application to Employers Insurance of Wausau (Wausau Insurance) and sent a letter to Pimental informing him of the assignment and stating that the estimated premium was $ 37,600. The Pimentals then began a pattern of deception with Wausau Insurance similar to that employed with Hartford Insurance. Arthur told auditors for Wausau Insurance that A.P.S. Products did concrete rebar construction rather than the steel erection, welding, or decking work that it actually performed. Loretta, in turn, initially provided Wausau Insurance with incomplete records that significantly underrepresented the company's payroll.

As part of a block transfer of policies, MWCRIB reassigned the Pimentals' insurance coverage from Wausau

Insurance to Savers Property & Casualty Insurance Company ("Savers Insurance") in October of 1997. Using the 1996 MWCRIB application as well as Wausau's most recent policy, Savers Insurance initially calculated a $ 33,671 yearly premium based on a $ 65,000 payroll in concrete rebar. Once again, the Pimentals misrepresented the nature of their business to Savers Insurance. Arthur Pimental told a loss-control inspector for Savers Insurance that his company only worked on concrete rebar. Further, the Pimentals failed to respond to several inquiries from Savers Insurance auditors, resulting in Savers Insurance using a 50% increased payroll figure of $ 97,500 for the 1997-to-1998 coverage period. This was still substantially smaller than the actual payroll figure of $ 168,162.

In total, from October 1993 to August 1998, the Pimentals paid their employees approximately $ 738,000 in salary. The insurance premiums they paid during this period were based on a payroll of less than half that amount -- about $ 340,000. Throughout the time period, the Pimentals paid premium rates for concrete rebar even though their work consisted almost entirely of steel erection, welding, and decking. Because different premium rates apply to each of these three activities and there was little evidence concerning how many employee hours were dedicated to each separate activity, the extent of the monetary benefit the Pimentals received from misrepresenting their business is unclear.[2] A jury could easily infer that the **[*583]** premiums would have been higher if Pimental had been honest in what he told his insurers.

II. Procedural History

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[2] Indeed, Pimental stresses on appeal that it is possible that he actually lost money from misrepresenting the type of operations his company performed, because some of those operations were cheaper to insure than was concrete rebar.

On September 29, 1999, Arthur and Loretta Pimental were each indicted on one conspiracy count, *18 U.S.C. § 371*, and fourteen counts of mail fraud, *18 U.S.C. § 1341*. Before trial, the Pimentals moved to dismiss the indictment, claiming that the government had violated *Fed. R. Crim. P. 6(e)* when it disclosed, after earlier receiving permission from another judge on the court to do so, grand jury materials to an investigator for the Insurance Fraud Bureau of Massachusetts. *Pimental, 236 F. Supp. 2d at 103*. In a trio of pretrial opinions, the district court held that there had been a *Rule 6(e)* violation (despite the prior approval of a different judge of the court), but held that the violation was harmless because the grand jury testimony that resulted from the transmittal of information to the IFB investigator was not crucial to the grand jury's decision to indict. *United States v. Pimental, 204 F.R.D. 223 (D. Mass. 2001)*; *United States v. Pimental, 201 F.R.D. 24 (D. Mass. 2001)*; *United States v. Pimental, 199 F.R.D. 28 (D. Mass. 2001)*.

The government voluntarily dismissed three of the mail fraud counts on September 16, 2002, and the case proceeded to trial the next day. *Pimental, 236 F. Supp. 2d at 104*. After six days of testimony, a jury acquitted Loretta Pimental on all counts and acquitted Arthur Pimental on the conspiracy count and nine of the eleven mail fraud counts. The two mail fraud counts on which the jury convicted Arthur Pimental were both based on mailings sent by loss-control inspectors. The first count was premised on the October 5, 1994 mailing from William Brooks to Hartford Insurance, in which Brooks reported that Arthur Pimental had said that Pimental Steel Erectors only performed concrete rebar work. The second count was based on the letter from Timothy Bergeron to Arthur Pimental summarizing their meeting and noting that Pimental Steel was, according to Pimental, involved only in concrete rebar work.

After the jury returned its verdict, Arthur Pimental moved for a judgment of acquittal pursuant to *Federal Rule of Criminal Procedure 29(c)*. He also renewed his motion for a dismissal of the indictment, arguing that evidence presented at trial provided a previously unavailable basis for believing that the information disclosed to the IFB investigator had substantially influenced the grand jury's decision to indict.

The district court held that there was sufficient evidence for the jury to find the existence of a scheme to defraud and that the mailings were reasonably foreseeable. *Id. at 109, 110*. But it nonetheless granted Pimental's *Rule 29* motion because it concluded that there was not sufficient evidence that either mailing was in furtherance of the fraudulent scheme. Id. It also declined to rule on Pimental's renewed motion for dismissal of the indictment based on the *Rule 6(e)* violation, finding that this issue was mooted by its grant of the *Rule 29* motion. *Id. at 112*.

The government appeals the district court's grant of the *Rule 29* motion. Arthur Pimental, in turn, cross-appeals the denial of his motion to dismiss the indictment for the *Rule 6(e)* violation.

III. The *Rule 29* Motion

Our review of the district court's *Rule 29* determinations is de novo. *United* **[*584]** *States v. Moran, 312 F.3d 480, 487 (1st Cir. 2002)*. A judgment of acquittal should only be granted when the evidence and all reasonable inferences to be drawn from the evidence, both taken in the light most favorable to the government, are insufficient for a rational factfinder to conclude that the prosecution has proven, beyond a reasonable doubt, each of the elements of the offense. Id.; *United States v. Campbell, 268 F.3d 1, 6 (1st Cir. 2001)*. "Under this formulation, a court considers all the evidence, direct and circumstantial, and resolves all evidentiary conflicts in favor of the verdict." *Moran, 312 F.3d at 487.*

To demonstrate a violation of the mail fraud statute, *18 U.S.C. § 1341*, the prosecution must prove "(1) the devising or attempting to devise a scheme or artifice to defraud; (2) the knowing and willing participation in the scheme with the specific intent to defraud; and (3) the use of the mails in furtherance of the scheme." *United States v. McCann, 366 F.3d 46, 51 (1st Cir. 2004)* (quoting *United States v. Montminy, 936 F.2d 626, 627 (1st Cir. 1991))*. The government must also demonstrate, in order to prove causation, that the defendant knew, or could have reasonably foreseen, that "the use of the mails [would] follow in the ordinary course of business." *Pereira v. United States, 347 U.S. 1, 9, 98 L. Ed. 435, 74 S. Ct. 358 (1954)*; cf. *United States v. Fermin Castillo, 829 F.2d 1194, 1198-99 (1st Cir. 1987)* (interpreting wire fraud statute). "It is not necessary to prove that the defendant personally executed the mailings, but merely that the defendant 'caused the mailing by doing some act from which it is reasonably foreseeable that the mails will be used.'" *United States v. Bruckman, 874 F.2d 57, 60 (1st Cir. 1989)* (quoting *United States v. Gonzalez-Sanchez, 825 F.2d 572, 588 (1st Cir. 1987))*.

There was easily sufficient evidence for the jury to find the existence of a scheme to defraud and that the use of the mails was reasonably foreseeable, as discussed below. As to the "in furtherance of" requirement, the district court erred in holding that there was not sufficient evidence for the jury to find that the two loss-control inspectors' mailings were in furtherance of the fraudulent scheme. Accordingly, we reverse the grant of the *Rule 29* motion and reinstate the convictions.

A. The Existence of a Scheme to Defraud

Pimental challenges the district court's conclusion that there was sufficient evidence of a scheme to defraud, hoping to knock out the convictions on grounds other than those relied upon by the district court.[3] First, he argues that the evidence at trial did not establish that Pimental Steel's employees were actually covered by workers' compensation insurance when they were performing steel erection. Pimental says the jury had no way of eliminating the possibility that if he had submitted a claim on behalf of an injured employee, the insurance company would have discovered the incorrect premium payments and thus refused to pay the **[*585]** employee. Pimental does not contest the district court's conclusion that, as a matter of Massachusetts law, the insurance company would be obliged to cover Pimental Steel's employees under such circumstances.[4] *Pimental, 236 F. Supp. 2d at 106* (relying on *Employers Mutual Liability Insurance Co. of Wisconsin v. Merrimac Mills Co., 325 Mass. 676, 681, 92 N.E.2d 256 (1950))*. But he says that there was no evidentiary basis for the jury to reach this conclusion. From this premise, Pimental argues that the jury could not have found that the insurers suffered any loss as a result of Pimental's actions. And that, concludes Pimental, means that there was insufficient evidence for the jury to conclude that there existed a "scheme to defraud."

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[3] As recounted in Part I, there was significant evidence that, in addition to lying about the nature of Pimental Steel's operations, Pimental also lied about the size of the company's payroll. Pimental says that this evidence "only established that in workers' compensation insurance applications, [he] made estimates of the payroll, which often vary widely from the actual payroll, particularly in the construction industry." Not so. There was more than sufficient evidence for the jury to find that Pimental did indeed misrepresent the size of Pimental Steel's payroll in an effort to defraud the insurance companies. Nonetheless, in order to simplify the analysis of whether Count Four was in furtherance of the fraudulent scheme, see infra Part III.B.ii., we focus on Pimental's misrepresentations concerning the nature of Pimental Steel's operations.

[4] As Pimental does not raise this issue, we do not address it.

Pimental's argument goes too far. In order to find a "scheme to defraud," the jury simply had to determine that Pimental was attempting to "wrong[] one in his property rights by dishonest methods or schemes." *McNally v. United States, 483 U.S. 350, 358, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987)* (quoting *Hammerschmidt v. United States, 265 U.S. 182, 188, 68 L. Ed. 968, 44 S. Ct. 511 (1924))*. Here, there was more than sufficient evidence for the jury to conclude that Pimental lied about the nature of his company's work in order to pay cheaper premiums on his workers' compensation insurance. The jury easily could have concluded that Pimental was attempting to dishonestly minimize the insurance premiums to the company that he should have been paying under Massachusetts law. The speculative possibility that if an employee had filed a claim with Hartford Insurance, it would have discovered Pimental's lies and refused to pay the employee is irrelevant. To convict, the jury need not have drawn any additional conclusion.

Pimental also argues that there was insufficient evidence of a scheme to defraud because the evidence was inconclusive as to whether he ultimately paid premiums that were less than what he actually owed, for the reasons discussed earlier. But whether Pimental actually paid more or less in premiums than he actually owed goes only to the success of his fraudulent scheme, not to its existence. See *United States v. Martin, 228 F.3d 1, 16 (1st Cir. 2000)* (success in scheme is not needed to support mail fraud conviction). In addition, the argument fails on its own terms. A rational jury could have found that Pimental, because of his own actions, did not in fact have the option of making variable premium payments according to the amount of time that his workers spent performing different job tasks. The evidence at trial established only that:The payroll of an individual employee may be divided and allocated to more than one classification, provided the entries in the original records of the insured disclose an allocation of each such individual employee's payroll. Any such operation for which separate payroll records are not maintained shall be assigned to the highest rated classification which applies to the job or location where the operation is performed.(emphasis added). There was extensive testimony that the Pimentals specifically chose not to keep records documenting the breakdown of their employees' work and that they repeatedly misled the insurance company concerning their payroll in order to pay lower rates. A reasonable jury could have easily found that the Pimentals did not maintain "separate payroll records" and hence that the rate they should have paid, for all payroll hours, was the rate for steel erection. This would have **[*586]** been significantly more than the amount they actually paid.

B. The "In Furtherance Of" Requirement

In order for a mailing to be "in furtherance" of a fraudulent scheme, it "must be for the purpose of executing the scheme," *United States v. Maze, 414 U.S. 395, 399-400, 38 L. Ed. 2d 603, 94 S. Ct. 645 (1974)* (quoting *Kann v. United States, 323 U.S. 88, 94, 89 L. Ed. 88, 65 S. Ct. 148 (1944))*, or "part of the execution of the scheme as conceived by the perpetrator at the time," *Schmuck v. United States, 489 U.S. 705, 715, 103 L. Ed. 2d 734, 109 S. Ct. 1443 (1989)*. The mailing "need not be an essential element of the scheme"; it can be merely "incident to an essential part of the scheme," *id. at 710-11* (quoting *Pereira, 347 U.S. at 8*), or "a step in [the] plot," *id. at 711* (quoting *Badders v. United States, 240 U.S. 391, 394, 60 L. Ed. 706, 36 S. Ct. 367 (1916))*; see also *McCann, 366 F.3d at 52*.

(i) Count Two Conviction -- Brooks's Account Data Report

The mailing that formed the basis of Count Two, on which the jury convicted Pimental, was Brooks's October 5, 1994 "Account Data Report" to Hartford Insurance, which recounted the substance of his loss-control interview with Pimental. In that report, Brooks wrote that Pimental had said that his business involved only rebar construction.

In Schmuck, the Supreme Court addressed the "in furtherance of" requirement with respect to a mailing of some similarity to Brooks's loss-control report. The defendant in Schmuck purchased used cars, rolled back their odometers, and then resold them to retail dealerships, who, in turn, sold them to consumers. *489 U.S. at 707*. The Court held that the mailing of a title-application form from the dealership that purchased Schmuck's vehicle to a state agency, at the time of the dealership's sale of the car to the end-consumer, met the "in furtherance of" element of the mail fraud statute. *Id. at 710-12*. In cases of "ongoing fraudulent ventures," reasoned the Court, mailings that help maintain a harmonious relationship between the perpetrator and the victim further the fraudulent scheme by helping to ensure its continued success in the future. *Id. at 711-12*. Even though such mailings were not absolutely necessary for the scheme to succeed in the short term, they allowed the dealerships who purchased the cars from Schmuck to sell them to the ultimate consumer and thus helped guarantee that the dealerships would continue to purchase cars from Schmuck in the future. *Id.*

Likewise, the mailing from Brooks to Hartford Insurance helped Pimental maintain his ongoing fraudulent venture by ensuring that he continued to receive insurance coverage. The jury was entitled to conclude that had Brooks never mailed his loss-control report, Hartford Insurance would have terminated its insurance coverage and Pimental's scheme would have, at least temporarily, come to a halt. Indeed, Pimental's policy with Hartford Insurance was threatened with cancellation when he attempted to avoid a loss-control interview in the summer of 1995 by ignoring repeated inquiries from Bergeron. If Hartford Insurance were not to receive a completed loss-control report, Bergeron's letter warned, Pimental's insurance coverage would be "subject . . . to cancellation." A rational jury could have readily found that the loss-control report from Brooks to Hartford Insurance furthered Pimental's fraudulent scheme because it was a necessary step in the continued relationship between Pimental and his victim, Hartford Insurance. Cf. *United States v.* **[*587]** *Woodward, 149 F.3d 46, 64-65 (1st Cir. 1998)* (in ongoing scheme in which lobbyist made illegal purchases for a public official, the mailing of a credit card bill to the lobbyist satisfied the "in furtherance of" requirement because if the lobbyist "did not pay [the] bills, his credit line would have been terminated and the gratuities could not have continued").

The district court reached the opposite conclusion by relying on a statement in a post-Schmuck First Circuit case, *United States v. Pacheco-Ortiz, 889 F.2d 301, 305 (1st Cir. 1989)*, that the perpetration of the fraud or its subsequent cover-up must have "depended in some way on" the mailing. *Pimental, 236 F. Supp. 2d at 108.* The court interpreted this formulation to impose a "but for" test for the "in furtherance of" element of mail fraud -- i.e. that a fraudulent scheme "depends on" a mailing only when but for that mailing, the scheme could not have succeeded or would have been discovered.[5] The district court concluded that Pacheco-

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[5] The flexibility of the English language is one of its wonders; that flexibility can lead to misunderstandings. Pacheco-Ortiz simply said that "for the mailings to be considered in furtherance of the scheme, the scheme's completion or the prevention of its detection must have

Ortiz's use of "depends on" meant "but-for" despite language in Pacheco-Ortiz that also said that it was not necessary that each mailing guarantee the success of the scheme or even significantly advance it -- that it only need be closely related to the scheme. *889 F.2d at 305.*

Applying its approach, the district court found that there was no evidence that, absent the mailing of the loss-control report, Hartford would necessarily have uncovered the scheme and terminated Pimental's coverage. Although the court noted that it was possible that a loss-control report describing the Pimentals' business as steel erection "might have raised an eyebrow" at the insurance company, it concluded that the government did not present sufficient evidence on this point; the evidence did not demonstrate that "the jig would have been up" had Brooks's loss-control report stated that the Pimentals' business was steel erection. Id.

The district court's search for a direct, but-for, link between Brooks's mailing and the fraudulent element of Pimental's scheme -- the claim that his business involved concrete rebar and not steel erection -- misapprehended the law in two ways. First, a mail fraud conviction does not require the existence of a "but-for" link between the mailing and the fraud, or its cover-up. Such a rule would harken back to the oft-rejected notion that the mailing needs to be connected with the essence of the fraud. It need not be, so long as it is "incident to an essential element of the fraud."

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depended in some way on the mailings." *889 F.3d at 305* (internal quotations omitted) (emphasis added). It did not say there was a "but-for" requirement. The dictionary does say that the word "depend" can mean that something is "a necessary condition," but the word can also mean "to have a connection or relationship as a subordinate part or appurtenance." Webster's Third New International Dictionary 604 (1993).

See *Schmuck at 710-11*. For instance, in Schmuck itself there was no but-for relationship between the success of the scheme and the mailing of the title-application form. Schmuck could have continued selling cars that had been tampered with even if the dealerships that bought those cars did not mail the title-application forms. The mailings were nonetheless "in furtherance" of the scheme because they contributed to its overall success by making it more likely that dealerships would come back to Schmuck to purchase more cars.

Similarly, mailings that are designed to "lull the victims into a false sense **[*588]** of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendant[] less likely than if no mailings had taken place" are sufficient under the statute. *United States v. Lane, 474 U.S. 438, 451-52, 88 L. Ed. 2d 814, 106 S. Ct. 725 (1986)* (quoting *Maze, 414 U.S. at 403*) (emphasis added); *United States v. Lopez, 71 F.3d 954, 961-62 (1st Cir. 1995)*. Preventing the detection of an ongoing or a completed fraudulent scheme is not contingent on lulling the victim into a false sense of security. Instead, lulling the victim into a false sense of security contributes to the prevention of the scheme's detection by making detection of the scheme less likely. This is sufficient to satisfy the "in furtherance of" requirement of the mail fraud statute. See, e.g., *McCann, 366 F.3d at 53* (letter sent after the culmination of the fraud was in furtherance of fraud because it "served the important purpose of decreasing the risk of detection"); *Lopez, 71 F.3d at 956-57, 961* (fax sent two years after culmination of fraud that attempted to explain certain documents that were submitted to cover-up the illegal withdrawal was in furtherance of fraudulent scheme in wire fraud conviction because it made defendant's apprehension less likely); *United States v. Young, 955 F.2d 99, 108 (1st Cir. 1992)* (Breyer, J.) (mailings that misrepresented disposition of embezzled funds helped conceal the fraud and were thus sufficient to meet the "in furtherance of" requirement).

A second, independent, problem with the district court's analysis is that it focused exclusively on Pimental's misrepresentations in determining whether the mailings furthered his overall scheme. In fact, even under the district court's overly stringent and incorrect but-for test, the jury would have been entitled to conclude that Pimental's scheme depended on Brooks's mailing. The reason is that the success of the scheme did not simply depend on Pimental lying about the nature of his business's operations -- it also depended, among other things, on the mailing and processing of loss-control reports. Were those reports not mailed, there was significant evidence that Hartford Insurance would have cancelled the Pimentals' coverage. One of the central points of Schmuck is that a mailing that is itself innocent and that seems to accomplish an innocent end can nonetheless be in furtherance of a fraudulent scheme.

ii. Count Four Conviction -- Bergeron's Mailing to Pimental

The second Count on which Pimental was convicted is premised on Bergeron's mailing to Pimental himself of a summary of the loss-control interview. In this mailing, Bergeron states, based on what Pimental said in the interview, that Pimental's business continued to be the installation of concrete reinforcement bar.

Pimental argues that whether he received a summary of his meeting with Bergeron was immaterial to whether Hartford Insurance would continue to provide the Pimentals with insurance for their employees at the incorrect rate. Pimental also argues that lying to loss-control inspectors as opposed to lying to auditors was not an essential part of the scheme. This was particularly so, says Pimental, because the evidence was that the loss-control division of Hartford Insurance was entirely separate from the division that set premiums and investigated fraud. Indeed, Brooks was not even an employee of Hartford Insurance, but was instead an independent contractor.

A reasonable jury easily could have concluded that Pimental needed to be or thought he needed to be consistent in his lies to representatives of the insurer, regardless of who the representative was. It is not hard to infer that an inconsistent **[*589]** report from a loss-control inspector could somehow trigger alarms in the premium setting group. The harder question is why a letter to Pimental, recounting his fraudulent statements, was in furtherance of the fraud. There are several responses. One is that Pimental now knew that his deception of the inspector was successful -- his copy showed that his lies were being sent to the company records. This could only encourage him in the scheme. Further, there was an obvious purpose to Bergeron sending a summary of his report to Pimental -- it allowed Pimental to correct any inaccurate information on the report. Pimental chose not to correct the misinformation, thus perpetuating the fraud and demonstrating further his fraudulent intent. See *United States v. Morrow, 39 F.3d 1228, 1236-37 (1st Cir. 1994)* (in insurance fraud scheme, the insurance company's mailing to the insured acknowledging that it had received the fraudulent claim was, under the Schmuck formulation, "'incidental' to an essential element in the scheme").

C. Causation: Were the Mailings Reasonably Foreseeable?

Pimental argues that there was insufficient evidence for the jury to conclude that he "caused" either of the mailings at issue because neither of them was reasonably foreseeable. See *Pereira, 347 U.S. at 8-9.* There was no evidence, according to Pimental, of a "course of business" between himself and his insurers that would have led a reasonable person to have anticipated either of the mailings that formed the basis for his convictions. He points to evidence that Brooks could not recall ever telling Pimental that the loss-control report would be mailed to Hartford Insurance. Similarly, Bergeron testified only that he told Pimental that he would send the loss-control report to Hartford, not that he would send it to Pimental himself. All of this, concludes Pimental, means there was no way that he could reasonably foresee that either Brooks's or Bergeron's letters would ever be written or mailed.

Pimental's arguments are premised on an incorrect understanding of the law. As the district court correctly held, it is simply the "use of the mails" in the course of the scheme rather than the particular mailing at issue that must be reasonably foreseeable for the causation element of a mail fraud offense to be satisfied.[6] See *Morrow, 39 F.3d at 1237* (all that is required to show causation is that the defendant "participated in a crime in which it was foreseeable . . . that the mails would be used" and that was satisfied where defendant "admitted at trial that he knew that automobile insurance claims are processed in part through the use of the mails"); *Bruckman, 874 F.2d* **[*590]** *at 60* ("The **[*590]** causation element is met as long as some use of the mails was reasonably to be anticipated in the course of the scheme."); *Fermin-Castillo, 829 F.2d at 1198* ("As long as some use of the instrumentality in the course of the endeavor was reasonably to be anticipated, the causation requirement is met."); see also *United States v. Bortnovsky, 879 F.2d 30, 38-39 (2d Cir. 1989)* (noting that the causation element of mail fraud "has been so liberally construed as to suggest that it requires only that the use of the mail itself, rather than a particular mailing, be reasonably foreseeable" and endorsing that view).

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[6] The facts of Bruckman clearly illustrate this principle. The defendant in that case submitted a fraudulent financial statement to a bankruptcy court in connection with the attempted purchase of a corporation under that court's protection. *874 F.2d at 59-60.* The bankruptcy court's subsequent mailings of the statement to the corporation's creditors formed the basis for the defendant's convictions. *Id. at 60.* In responding to Bruckman's causation argument, the court held that it was not necessary for the bankruptcy court's mailings to the company's creditors to have been reasonably foreseeable. Rather, it was sufficient that there "was ample evidence from which the jury could conclude both that Bruckman participated in the scheme to defraud, and that some use of the mails was to be anticipated in the course of such scheme." Id. (emphasis added). Because the "jury could reasonably infer that mailings would be foreseeable in the course of the bankruptcy reorganization proceedings related to the intended acquisition of [the corporation] by Bruckman and others," there was sufficient evidence for the jury to conclude "that Bruckman knowingly caused the mailings" at issue. Id.

The principle that it is the use of the mails (rather than the specific mailing that is charged) that must be reasonably foreseeable as a result of the scheme is affirmed by one of the primary cases upon which Pimental relies.[7] In *United*

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[7] Pimental also relies on *United States v. Smith, 934 F.2d 270 (11th Cir. 1991)*, which is indeed in tension with our analysis. That case involved an insurance fraud in which the defendant faked an injury from a staged automobile accident. *Id. at 271*. The defendant received a claims draft, which is similar to a check, in person from the insurance agent, but a copy of the draft was sent to the insurance company. Id. The court found that there was insufficient evidence that the use of the mails was reasonably foreseeable because it was not common knowledge that insurance companies mail accounting copies of drafts. See *id. at 273*. In so holding, the court agreed "that it is foreseeable that communications involving the policy, the details of the claim, or requests for the payment of the claim would be mailed." Id. But the court found this to be irrelevant because "the substantive counts of [the defendant's] indictment did not allege such mailings." Id.

To the extent that *Smith* is inconsistent with our analysis, we reject its approach.

States v. Walters, 997 F.2d 1219 (7th Cir. 1993), the court held that there was insufficient evidence on the causation element of a mail fraud offense because the evidence did not establish "that [the defendant] conceived a scheme in which mailings played a role." *Id. at 1222*. Rather than focus on the predictability of specific mailings in the indictment, the Walters court thus premised its analysis on the question of whether the use of the mails, as a general matter, was a foreseeable component of the scheme to defraud. See *id. at 1223-24*. Indeed, in the course of its analysis, the court noted that insurance fraud is the "paradigm" case in which the use of the mails is reasonably foreseeable because the payment and submission of insurance claims typically involves mailings between the insurance company's agents and the insured. See *id. at 1223*. So here.

IV. Pimental's Cross-Appeal

During its preliminary investigations in this case, the U.S. Attorney's office filed an ex parte motion with the district court seeking permission, on the basis of the exception to grand jury secrecy, to disclose grand jury materials to investigators and analysts of the IFB. The exception allows disclosure of grand jury materials to "any government personnel -- including those of a state or state subdivision" when such disclosure is necessary to prosecute a criminal case. *Fed. R. Crim. P. 6(e)(3)(A)(ii)*. The district court motion judge, who was not the trial judge, granted the motion without opinion. No disclosure was made by the prosecutor without court permission.

Subsequently, during pretrial discovery, Pimental moved to dismiss the indictment, arguing that the government had violated *Rule 6(e)* when it disclosed to Scott Faragi, an IFB investigator who later testified before the grand jury, Pimental's bank records and other material that had been obtained through the grand jury's subpoena powers.

Pimental argued that IFB agents such as Faragi were not "government personnel" **[*591]** within the meaning of *Rule 6(e)(3)(A)(ii)*, and thus the exception to grand jury secrecy was not applicable and the earlier district court order was wrong.

In response, the trial court held that IFB investigators can not be "government personnel" within the meaning of *Rule 6(e)*, and thus that the earlier ruling allowing the prosecutor to disclose grand jury materials to IFB investigators was in error. *Pimental, 199 F.R.D. at 33-37 (D. Mass. 2001)*; *Pimental, 201 F.R.D. at 25-26*. It did not hold that because the disclosure had been authorized by the court, there could be no dismissal of the indictment. Rather, the district court refused to dismiss Pimental's indictment because the "error" did not substantially affect the grand jury's decision to indict, and thus it was harmless. *Pimental, 204 F.R.D. at 227-28*.

Pimental now challenges this pre-trial denial of his motion to dismiss the indictment. He also asks this court to consider his post-trial renewal of that motion, which the district court found to be moot due to its grant of Pimental's *Rule 29* motion.

We conclude that the first district court's implicit conclusion that IFB agents are "government personnel -- including those of a state or state subdivision" within the meaning of *Rule 6(e)(3)(A)(ii)* was, on these facts, not error. We do not hold that all IFB employees, regardless of the circumstances, are government personnel, but only that here that decision was correct. We thus affirm on alternate grounds the denial of Pimental's motion to dismiss the indictment, which disposes of his post-trial renewal of the motion.[8] See *Bonano v. E. Caribbean Airline Corp., 365 F.3d 81, 86 (1st Cir. 2004)* ("We are not confined to the lower court's rationale, but may affirm a judgment on any independent ground made manifest by the record.").

(A) Grand Jury Secrecy and the Limited Exception for Government Personnel.

Federal grand juries are responsible for investigating criminal allegations while simultaneously shielding innocent citizens from unfounded accusations of criminal conduct. See *Branzburg v. Hayes, 408 U.S. 665, 686-87, 33 L. Ed. 2d 626, 92 S. Ct. 2646 & n.23, (1972)*. These sometimes competing roles "underlie[] the 'long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts.'" *United States v. Sells Eng'g, Inc., 463 U.S. 418, 424, 77 L. Ed. 2d 743, 103 S. Ct. 3133 (1983)* (quoting *United States v. Procter & Gamble Co., 356 U.S. 677, 681, 2 L. Ed. 2d 1077, 78 S. Ct. 983 (1958))*. Grand jury secrecy facilitates the investigation of criminal charges by assuring potential witnesses that their testimony will not become public knowledge, thus encouraging them to testify freely and limiting the potential that they will be improperly influenced by those under investigation. See id. At the same time, it ensures "that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." Id. (quoting *Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219, 60 L. Ed. 2d 156, 99 S. Ct. 1667 (1979))*.

The specific dimensions of the grand jury secrecy requirements are codified in *Fed. R. Crim. P. 6(e)*. That Rule prohibits certain people – including grand jurors, interpreters, and, of particular relevance here, "attorneys for the government" -- from disclosing "a matter occurring before the grand jury." *Fed. R. Crim. P. 6(e)(2)(B)*. *Rule 6(e)* also contains certain exceptions **[*592]** to the general secrecy requirement. The first pertinent exception at issue in this case, under subpart *(3)(A)(ii)*, allows "disclosure of a grand-jury matter" to "any government personnel -- including those of a state or state subdivision or of an Indian tribe -- that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." *Fed. R. Crim. P. 6(e)(3)(A)(ii)*. The second, under *6(e)(3)(E)*, empowers a district court to authorize disclosure in certain situations. We think it implicit that a district court may also act in a motion to authorize disclosure under subpart *3(A)*.

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[8] The government assumed arguendo for purposes of this appeal that *Rule 6(e)* was violated. We think it better to address the issue directly.

(B) The IFB and the "Plain Meaning" of "Government Personnel."

The IFB is a "quasi-governmental entity," *In re Justices of the Superior Court, 218 F.3d 11, 13 (1st Cir. 2000)*, that investigates allegations of fraudulent insurance transactions. *Commonwealth v. Ellis, 429 Mass. 362, 365, 708 N.E.2d 644 (1999)*. Its creation was authorized by Massachusetts statute, St. 1996, c. 427, § 13,[9] and carried out by two voluntary associations of Massachusetts insurance carriers, the MWCRIB and the Automobile Insurance Bureau (AIB), which are themselves licensed under Massachusetts law. See *id. at 13*; *Mass. Gen. Laws ch. 175A § 8* (licensing AIB); *Mass. Gen. Laws ch. 152 § 52C* (licensing MWCRIB). See generally *Ellis, 429 Mass. at 365*. The authorizing statute requires that the MWCRIB and AIB each fund half of the IFB's budget, § 13(c), and each provide the IFB with five of its fifteen Board members, § 13(a). The remaining five IFB Board members are Massachusetts public officials. § 13(a). Under the statutory scheme, every insurer "having reason to believe that an insurance transaction is fraudulent" must advise the IFB of its suspicions. § 13(e). The IFB, in turn, is required to review those cases and investigate further when necessary. § 13(f). Where the IFB's executive director "is satisfied that a material fraud, deceit, or intentional misrepresentation has been committed in an insurance transaction," he must "refer the matter to the attorney general, the appropriate district attorney or the United States attorney." § 13(h) (emphasis added).

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[9] This Act is codified in the notes to *Mass. Gen. L. ch. 266, § 111B*, rather than in the section itself. This confusing choice of codification has resulted in the incorrect referencing of the Act as codified as "Mass. Gen. Laws ch. 427, § 11." See, e.g., *In re Justices, 218 F.3d at 13*.

The trial court rejected the motion court's implicit holding, concluding that IFB employees can not be "government personnel," based primarily on a "plain meaning" reading of the term. Emphasizing that the IFB's funding comes entirely from two private associations of insurance companies and that the majority of its Board are not public officials, the court concluded that "the IFB inhabits a region of the private/public spectrum that is much closer to a purely private agency." See *Pimental, 199 F.R.D. at 33*.

As an initial matter, there may well be instances in which an entity (or at least some of its employees) is considered governmental for a particular purpose despite the fact that it is both controlled and financed by private individuals. Even assuming that the IFB is completely controlled and financed by private insurance companies, that does not necessarily mean that its employees cannot be government personnel for purposes of *Rule 6(e)*.

Here, the district court's characterization of the IFB as entirely funded and controlled by private entities was incorrect. While it is true that the IFB's funding **[*593]** comes entirely from MWCRIB and AIB, two private associations of insurance companies, both of those associations are required by Massachusetts law to provide that funding. See st. 1996, c. 427, § 13(c); see also *Ellis, 429 Mass. at 373 n. 16*. This is not an instance in which private entities have voluntarily chosen to spend their resources on investigative personnel. Cf. *United States v. Tager, 638 F.2d 167, 168 (10th Cir. 1980)* (where insurance companies voluntarily chose to fund an entity to investigate insurance fraud and completely controlled the scope of its actions, employees of the entity were not "government personnel" within the meaning of *Rule 6(e)(3)(A)(ii)*).[10] If anything, the IFB's funding is more akin to a state-mandated tax on insurance companies than a voluntary expenditure by private entities. Cf. *Keller v. State Bar of Cal., 496 U.S. 1, 9-11, 110 L. Ed. 2d 1, 110 S. Ct. 2228* (the mandatory charging of dues by the California Bar Association was state action that implicated *First Amendment* concerns). Indeed, the Supreme Judicial Court, the final arbiter on Massachusetts law, has explicitly found that "insurance companies [cannot] control the [IFB] by withdrawing financial support" even were they to attempt to forego the benefits of membership in the MWCRIB and AIB. If insurers withdrew from these organizations, "the Legislature could easily amend the statute to base assessments on premiums written or on some other standard." *Ellis, 429 Mass. at 373.*

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[10] In *Tager*, the government disclosed grand jury material to Mr. House, an employee of the Insurance Crime Prevention Institute (ICPI), an organization funded by insurance companies for the purpose of investigating possible frauds against them. *638 F.2d at 168*. Unlike in this case, though, there was no doubt that "neither the ICPI nor Mr. House was in any official position whatsoever." Id. The opinion does not indicate that any statute existed that established or authorized the ICPI, provided for its funding or structure, or gave it special responsibilities or privileges. See id. The court briefly noted that *Rule 6(e)(3)(A)(ii)* did not apply because Mr. House was not "government personnel," and spent the bulk of the opinion considering an entirely separate exception to grand jury secrecy that is not at issue here. See *id. at 168-69*.

The trial court's analysis also underestimates the full extent of the control that the Commonwealth exercises over the IFB. Although only a third of the IFB's board members are public officials, the IFB's purpose, organizational scheme, and basic operations are all dictated by statute. And while the IFB's day-to-day administration within the framework is, in large part, controlled by individuals who are not public officials, it is also subject to the constant oversight of the Massachusetts legislature, to which the IFB must submit a report every six months. § 13(j).

In addition, the IFB was conceived of and authorized by statute as part of a larger scheme to curb insurance fraud, a matter of significant public concern, both at the state level, see *Ellis, 429 Mass. at 365*, and nationally, see *United States v. Hurn, 368 F.3d 1359, 95 Fed. Appx. 1359 (11th Cir. 2004)* (affirming federal conviction for workers' compensation fraud); *United States v. Fore, 169 F.3d 104 (2d Cir. 1999)* (same). The IFB was also given significant powers to achieve this goal, including access to various state records that are not normally available to private entities and the right to review all suspicions of fraud within the insurance companies. See st. 1996, c. 427, §§ 13(d) & (e). It also has the affirmative obligation to report suspicions of fraud when they are sufficiently corroborated. § 13(h). Massachusetts chose to specify that those suspicions may be reported to federal prosecutors.

[*594] The IFB straddles the line between a government and a private entity, having attributes of each. As such, the text of the *Rule 6(e)(3)(A)(ii)* itself provides little guidance on whether IFB employees can be characterized as "government personnel" within the meaning of the Rule. Neither this Court nor any other federal circuit court[11] has previously addressed whether IFB employees, or similar quasi-state-government employees, fall within the term "government personnel" in *Rule 6(e)(3)(A)(ii)*.[12] Given the lack of either a clear textual resolution or of controlling authority, we turn to the history of the Rule and its purpose in allowing disclosure only to "government personnel" but not others.

(C) History and Purpose of the Exception to Grand Jury Secrecy in *Rule 6(e)(3)(A)(ii)*.

Before 1977, *Rule 6(e)* did not permit the disclosure of grand jury materials to government employees who were not attorneys. *Sells Eng'g, 463 U.S. at 436*. Over time, the lack of such a provision became "something of a problem in practice, because Justice Department attorneys found that they often needed active assistance from outside personnel -- not only investigators from the FBI, IRS, and other law enforcement agencies, but also accountants, handwriting experts, and other persons with special skills." Id. In response to this concern, the Advisory Committee on Rules suggested amending *Rule 6(e)* to allow disclosure to non-attorney government personnel. See *id. at 436-37*. Although Congress heatedly debated the proposed amendment and initially voted to disapprove it, concern focused principally on the prospect that grand jury materials would be used to pursue civil, rather than criminal, matters. See *id. at 437*. The principle of grand jury secrecy would be severely compromised, the objection went, if government agencies such as the IRS could indirectly use materials collected by the grand jury to help prosecute a civil case against an accused. See id. Most law-makers, it appears, agreed with the basic principle that grand jury materials "should be available to 'every legitimate member of [the] team' conducting the criminal investigation." *Id. at 439* (quoting the testimony of Acting Deputy Attorney General Richard Thornburgh, testifying before the House on behalf of the Justice Department).

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[11] Several district court decisions have addressed the issue. See, e.g., *In re Grand Jury Proceedings, 158 F. Supp. 2d 96 (D. Mass. 2001)*.

[12] The district court saw things differently, saying that *Tager, 638 F.2d 167*, involved a "finding [that] the government violated *Rule 6(e)(3)(A)(ii)* under circumstances materially indistinguishable from those here." *Pimental, 199 F.R.D. at 35*. *Tager* has very little to do with this case, where there is no immediately obvious answer to the question of whether the person to whom the disclosure was made was government personnel.

Precisely who was a "legitimate member" of the prosecution team was also a subject of some discussion:

> [Rep. James Mann:] Along the same line, the rule seems to restrict to other Government personnel the experts -- and I will use that term loosely -- that the attorney for the Government may call upon. We have a pretty big Government with a lot of experts, but on certain matters there may not be a governmental employee who is expert in that field. Is it your intention not to permit the prosecutor to call in an astrologer or astronomer, for example?
>
> Professor LaFave [Reporter, Advisory Committee on Criminal Rules]: Yes; that is correct. Apparently representatives of the Justice department whom we talked to about this particular problem **[*595]** did not seem to think that was a problem, in other words, that there was an occasion when they would need an expert and couldn't find the astrologer some place in the Federal

> Government.Proposed Amendments to the Federal Rules of Criminal Procedure: Hearing Before the House Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong. 92 (Feb. 24, 1977). The Rule's limitation of disclosure to "government personnel" thus reflected the basic belief that any needed expertise on a particular criminal matter could be found within the confines of the federal government.

As it turned out, federal prosecutors could not always find the necessary expertise within the federal government to prosecute a case. In some instances, federal prosecutors temporarily hired outside experts to assist in the prosecution of a case. Recognizing the import of sharing grand jury materials with such temporary employees, two circuit courts held that such temporary employees were indeed "government personnel" within the meaning of the *Rule 6(e)(3)(A)(ii)*. *United States v. Anderson, 778 F.2d 602, 605 (10th Cir. 1985)* (an expert witness on trust law); *United States v. Lartey, 716 F.2d 955, 963-64 (2d Cir. 1983)* (a retired I.R.S. agent). Federal prosecutors also occasionally sought the assistance of state and local employees, attempting to share secret grand jury materials with them. The district courts' responses to such efforts were more mixed. Compare *In re Grand Jury Proceedings, 445 F. Supp. 349, 350 (D.R.I. 1978)* (state and local personnel are not within the exception for government personnel in the Rule); with *In re 1979 Grand Jury Proceedings, 479 F. Supp. 93, 95-96 (E.D.N.Y. 1979)* (state and local personnel included).

Partially in response, *Rule 6(e)(3)(A)(ii)* was amended in 1985 to include expressly personnel "of a state or state subdivision" within the term "government personnel." See *Fed. R. Crim. P. Rule 6*, advisory committee's notes on 1985 amendments. "It is clearly desirable," the Committee wrote, "that federal and state authorities cooperate, as they often do" in complex cases such as "major fraud cases" and that federal prosecutors have access to "the assistance of state law enforcement personnel, which could be uniquely beneficial." Id. Although increased disclosure was obviously in tension with the general rule of grand jury secrecy, the Committee "emphasized that the disclosure permitted is limited": it is permissible only "in connection with the attorney for the government's 'duty to enforce criminal law' and only to those personnel 'deemed necessary . . . to assist' in the performance of that duty." Id.

Two important themes, for our purposes, can be discerned from this legislative history. First, a key purpose of *Rule 6(e)(3)(A)(ii)* is to facilitate cooperation between federal prosecutors and state personnel, who often are uniquely situated to assist in the investigation and prosecution of federal criminal cases. When court decisions tended to limit the potential for such cooperation because of concerns that state officials, who are not under the control of the federal government, could not be entrusted with grand jury materials, they were explicitly overruled by Congress. Thus, Congress made a conscious decision to entrust certain state, as well as federal, personnel with information concerning matters before a grand jury under certain conditions. Second, a primary safeguard for protecting the countervailing interest in the secrecy of grand jury proceedings is the requirement that such disclosure must be necessary for the enforcement of criminal law. Although the Rule's limitation to "government personnel" also helps to assure the secrecy of grand jury proceedings, that limit was not contemplated **[*596]** by either Congress in 1977 or the Advisory Committee in 1985 as the primary mechanism for doing so.

These themes convince us that the exception in *Rule 6(e)(3)(A)(ii)* may cover the unique quasi-governmental investigators of the IFB, depending on the facts of the situation.

In many instances of insurance fraud in Massachusetts, IFB investigators, rather than members of a more classic state law enforcement agency, will be the individuals who will have the most in-depth knowledge of that fraud. This is a direct result of the way in which Massachusetts has chosen to structure its investigations into such matters. Congress clearly desired that *Rule 6(e)(3)(A)(ii)* would allow federal prosecutors to take advantage of the state's investigative processes when such cooperation was necessary to prosecute federal crimes such as mail fraud.

Additionally, by specifically including state personnel in *Rule 6(e)(3)(A)(ii)*, Congress chose to trust state officials that the state itself had entrusted with the investigation of criminal matters. Here, Massachusetts has given the hybrid private/public IFB significant powers and responsibilities. In the course of their initial investigations, IFB investigators have access to non-public information that is not normally available to private investigators. § 13(d). If that investigation leads the IFB executive director to refer the case to the Attorney General's Office, the IFB investigator initially assigned to the case provides significant support to the prosecuting attorney. See *Commonwealth v. Harwood, 432 Mass. 290, 299, 733 N.E.2d 547 (2000)* ("It has been customary for principal investigators from the IFB to provide ongoing investigatory support for the Attorney General's subsequent inquiries."). Moreover, in state criminal prosecutions the state considers IFB agents to be assistants to prosecutors: "for the purposes of preserving potentially exculpatory evidence," the IFB is "under the general supervisory umbrella of the office of the prosecutor."

Id. at 300. Consequently, exculpatory evidence that IFB investigators lose can be attributed to the prosecution. Id.

We do not know the many factual variations that could be presented by use of IFB personnel on federal criminal investigative teams; we do not hold that all IFB personnel are qualified as a matter of status. Because the interest in the secrecy of grand jury proceedings is intense, this is not an area for categorical approvals tied to labels. The mere fact that a person works for the IFB does not mean that he or she fits the definition for government personnel within *Rule 6(e)(3)(A)(ii)*.

For this reason, we do not consider that the prosecution has self-executing powers under *Rule 6(e)(3)(A)(ii)* simply to designate IFB personnel as recipients of grand jury material. Rather, the prosecutor must seek court authorization where quasi-governmental agencies such as the IFB are involved and make a functional showing that the individual involved is within the Rule. In the past, the Office of the U.S. Attorney for Massachusetts has chosen to seek court authorization first, on a case-by-case basis whenever it wishes IFB personnel to be involved. It should continue to do so.

V.

The district court's grant of the *Rule 29* motion is **reversed**. The denial of the motion to dismiss the indictment is **affirmed** and the renewal of that motion is **denied**. **[*597]** The case is remanded to the district court for sentencing.

APPENDIX B

DISTRICT COURT'S OPINION GRANTING PETITIONER'S MOTION FOR ACQUITTAL

UNITED STATES OF AMERICA v. ARTHUR L. PIMENTAL, Defendant.

Criminal No. 99-10310-NG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

236 F. Supp. 2d 99; 2002 U.S. Dist. LEXIS 24311

December 19, 2002, Decided

PRIOR HISTORY: *United States v. Pimental, 204 F.R.D. 223, 2001 U.S. Dist. LEXIS 20957* (D. Mass., 2001)

JUDGES: NANCY GERTNER, U.S.D.J.

OPINIONBY: NANCY GERTNER

OPINION: [*101] MEMORANDUM AND ORDER

December 19, 2002

This case arises from one of several prosecutions brought in this district by the United States Attorney's Office at the behest of the Insurance Fraud Board of Massachusetts ("IFB"), a state-chartered but privately maintained organization created to investigate and police insurance fraud.

In this instance the IFB and U.S. Attorneys have focused on husband and wife Arthur and Loretta Pimental, who own and maintain a small, some might say a "mom-and-pop" construction business, for mail fraud. The indictment alleges that the Pimentals conspired to and did make use of the mails to misrepresent the nature of their construction work, and its amount of payroll, in order to obtain lower premiums for workers' compensation insurance. The IFB investigation that culminated in these charges was substantially assisted by the local ironworkers' union, which arranged and housed meetings between IFB investigators and former employees of Pimental who had since joined the union. Indeed, there is some suggestion in the evidence that the union facilitated the investigation in retaliation for the fact that Pimental ran a nonunion shop.

Significantly, the Pimentals were charged with a federal crime, even though remedies for conduct of this nature are amply available in the state courts -- including civil remedies. Somehow the IFB, an organization representing private insurers acting under the aegis of the state, has enlisted United States Attorneys to address issues through the criminal law that they could well resolve themselves through less drastic means and with private funds. In fact, the IFB, by making case referrals to the Federal Bureau of Investigation, even selects the exemplar defendants. Moreover, the selection of a federal forum seems particularly inappropriate here. The workers' compensation system is an instrument of state law subject to the administration of state agencies.

A jury trial was held in September 2000, and the jury rejected outright the indictment's allegation of conspiracy against both defendants, all eleven of its counts of mail fraud against Loretta Pimental, and nine of the eleven counts brought against her husband. The remaining two mail fraud counts centered on mailings from an independent loss control inspector to the Pimentals' insurers. These mailings, however, had nothing to do with the determination of premiums and played no role in perpetuating the charged scheme to defraud.

Accordingly, Arthur Pimental moves under Rule 29 for entry of acquittal on both counts, notwithstanding the verdict. Pimental's Rule 29 motion is **GRANTED**, due to the government's failure to establish the jurisdictional requirement of "use of the mails" on the counts convicted. Pimental also moves to dismiss based on the court's earlier finding that the government's sharing of secret grand jury materials violated *Federal Rule of Criminal Procedure 6(e). United States v. Pimental, 199 F.R.D. 28, 31 (D. Mass. 1999)* ("Pimental I"). I later found the violation to be harmless error, *United States v. Pimental, 204 F.R.D. 223, 228 (D. Mass. 2001)* ("Pimental III"), but based on evidence at trial that for the first time reveals the full effect of the violation on the grand jury proceedings, the Pimentals renew their motion to dismiss the indictment outright. For the reasons set forth below, Pimental's Rule 6(e) motion is **MOOT**.

I. FACTS/PROCEDURAL HISTORY

A. The Indictment

During the period of time covered in the indictment, i.e., April 1993 to April 1999, **[*102]** Arthur Pimental owned and operated a small construction outfit, variously named Pimental Steel Erectors, A. Pimental Steel Erectors, Inc., and A.P.S. Products, Inc. The company employed a handful of nonunion ironworkers on a seasonal basis and erected steel structures, mostly one- or two-story buildings. The erection process entailed the placement of girders, columns, and joints to support the structure, then laying corrugated-metal "decking" -- the ceiling and floors of the building -- and welding it into place. Though there was some suggestion in the openings that Pimental's business originally did foundation work, which involved steel-reinforced concrete, the evidence is uncontested that during the charged period, Pimental's company did not do this type of work.

To obtain workers' compensation insurance, as state law requires, see *Mass. Gen. Laws c. 152, § 25A*, Pimental had to provide his insurance companies, Hartford Fire Insurance Companies, Wausau, A Mutual Company, and, Savers Property & Casualty Insurance Company, with information relating to the type of work performed by his employees and the amount of pay they earned in a given period. Specifically, Pimental was required to enter a four-digit "job classification code" into forms that he would submit to his insurers. The state Workers' Compensation Rating and Inspection Bureau delineates job classifications and designates insurance rates for each classification based on the risk of injury associated with that trade. For example, the insurance rate for steel erection in 1993 was $ 99.35 per hundred dollars in payroll for buildings over two stories in height, and $ 69.22 for smaller structures. Foundation work involving steel-reinforced concrete, classified as "concrete construction," was less dangerous and thus, less expensive to insure. The rate for that work was $ 41.22, and for decking $ 19.82 or $ 24.66, depending upon the weight of the materials. These rates fluctuated from year to year, but the rates for welding and decking were consistently less than half the rate of concrete foundation work in a given year, which was in turn consistently less than half the rate for steel erection.

Where, as in Pimental's case, employees perform a range of tasks that fall under different classifications, an employer may list more than one classification code and parse out the tasks accordingly. In fact, in May 1999, six months before the government issued its indictment, the state

Workers' Compensation Rating and Inspection Bureau issued a report describing Pimental's entitlement to do just that. The Bureau report described its review of Pimental's operations and informed Pimental of the appropriate job classifications for the various tasks his workers performed at construction sites.

The Bureau concluded that welding of steel decking inside buildings, miscellaneous welding, installation of sheet metal to building exteriors, installation of concrete foundations, and erection of steel frames all fell under different classification codes, with different insurance rates. The Bureau stated that, under the state workers' compensation regime, Pimental was entitled to allocate payroll among the various job classifications as appropriate. Though it is clear that Pimental's classification of his company's work as "concrete construction" was inaccurate, the fact that he did some steel erection work did not mean he was obligated to insure his entire operation under this category.

On September 29, 1999, a federal grand jury indicted the Pimentals on one count of conspiracy, in violation of *18 U.S.C. § 371,* and fourteen counts of mail fraud, in violation of *18 U.S.C. 1341.* The indictment alleged that, where a portion of Pimental's work involved steel erection, he falsely **[*103]** characterized his work entirely as "concrete construction," so that he could take advantage of a lower insurance rate and pay lower premiums. The indictment did not address Pimental's entitlement to break down his operations into different tasks and insure them at different rates; thus, it did not take account of the fact that the insurance rate for concrete construction was in fact much higher than the rates for welding and decking, which represented significant components of Pimental's operations. The government also charged that Pimental understated the amount of his payroll to insurers.

The indictment was the culmination of a joint investigation conducted by the Federal Bureau of Investigation and the Insurance Fraud Bureau of Massachusetts ("IFB"). The IFB is, in the government's words, "a state-chartered, privately funded investigative entity, established by the Automobile Insurance Bureau of Massachusetts and the Workers' Compensation Bureau of Massachusetts pursuant to a grant of authority from the Massachusetts Legislature." The IFB's statutory charter assigns it the role of "prevention and investigation of fraudulent insurance transactions." Mass. St. 1996, ch. 427, § 13. The IFB is a hybrid of public and privates interests. Though fully funded by private insurance companies, the board of fifteen members that oversees the activity of the IFB includes five public officials.[1] The IFB did the preliminary inquiry into the Pimentals' practices and referred the case to the United States Attorney's Office ("USAO") for prosecution.

B. The Rule 6(e) Violation

The relationship between prosecutors and the IFB is a cozy one. It has become the practice of the USAO to move ex parte under *Rule 6(e) of the Federal Rules of Criminal Procedure* for disclosure of grand jury materials to the IFB. The Rule authorizes disclosure to "any government personnel -- including those of a state . . . -- that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." *Fed. R. Crim. P. 6(e)(3)(A)(ii)*. Courts have summarily granted these motions, and the emergency judge in this case did the same.

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[1] The remaining ten members of the IFB's governing board come from the governing committees of two organizations of Massachusetts insurers -- the Automobile Insurance Bureau of Massachusetts and the Workers' Compensation Rating and Inspection Bureau of Massachusetts.

The Pimentals challenged the delivery of grand jury materials to the IFB, and in a February 20, 2001, opinion, I held that the IFB was not "government personnel" for the purposes of the rule and awarded the Pimentals discovery on the "scope and possible impact" of the Rule 6(e) violation. *Pimental I, 199 F.R.D. at 33-35.* Due to issues raised in the oral argument of this motion, on April 11, 2001 I stayed discovery on the Rule 6(e) issue and ordered supplemental briefing on two questions: (1) whether discovery could be ordered absent a showing of a "knowing" or bad-faith violation of Rule 6(e), and (2) whether the government actually acted in bad faith or with knowledge of a discovery violation in this case. *United States v. Pimental, 201 F.R.D. 24, 27 (D. Mass. 2001).* In a June 4, 2001 decision, I held that, given the difficulty of the legal issues and conflicting precedent, the government's violation of Rule 6(e) was not "knowing." See *Pimental III, 204 F.R.D. at 224.* Nonetheless, I was also satisfied that a showing of a "knowing" violation or Rule 6(e) was not required in order to grant the Pimentals the discovery they requested. See id.

[*104] After reviewing the discovery granted to them, the Pimentals moved under Rule 6(e) for dismissal of the indictment. They argued that the government's disclosure of bank records to IFB investigator Scott Faragi substantially influenced the grand jury's decision to indict. Faragi testified before the grand jury as an expert on the insurance industry; he also prepared and explained summaries of the Pimentals' bank records. In a December 3, 2001 decision, I applied the harmless error standard, see Section II.B, infra, and held that Faragi's summation of the bank records was not crucial to the grand jury's decision to indict. *204 F.R.D. at 227-28.* The records were available to the grand jury in any case, and Faragi's assistance in digesting them -- though improperly obtained -- did not warrant dismissal of the indictment under Rule 6(e).[2] Id.

C. The Trial

The government voluntarily dismissed three of the mail fraud counts on September 16, 2002, and the case proceeded to a jury with twelve counts remaining against both defendants: a single charge of conspiracy to commit mail fraud, and eleven counts of mail fraud. The jury acquitted Loretta Pimental of all charges and convicted Arthur Pimental of Counts 2 and 4 of the revised indictment. Arthur Pimental moves under *Rule 29 of the Federal Rules of Criminal Procedure* for acquittal on the mail fraud counts, on grounds that the jury verdict was based on insufficient **[**12]** evidence of both a scheme to defraud and use of the mails. The defendants also renew their motion to dismiss the indictment under Rule 6(e), arguing that new evidence adduced at trial suggests that Faragi's role before the grand jury was indeed prejudicial and not harmless error.

II. DISCUSSION

A. The Rule 29 Motion

Rule 29(c) of the Federal Rules of Criminal Procedure permits a defendant to move for a judgment of acquittal after the entry of a guilty verdict. *Fed. R. Crim. P. 29(c)*. Where, as here, the defendant challenges the sufficiency of the prosecution's evidence, it is appropriate to view the evidence and draw all inferences in the light most favorable to the verdict. *United States v. McGauley, 279 F.3d 62, 66-67 (1st*

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[2] The Pimentals moved to dismiss the indictment a second time mid-trial, on September 30, 2002, and I again denied the motion.

Cir. 2002); United States v. Benjamin, 252 F.3d 1, 5 (1st Cir. 2001).

A mail fraud conviction requires proof beyond a reasonable doubt of "(1) the defendant's knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud, and (2) the use of the mails . . . in furtherance of the scheme." *McGauley, 279 F.3d at 67* (quoting *United States v. Woodward, 149 F.3d 46, 54 (1st Cir. 1998))* (alterations in original).

1. Scheme to Defraud

Federal courts have traditionally read the statutory term "defraud" to mean "wronging one in his property rights by dishonest methods or schemes" or to entail "the deprivation of something of value by trick, deceit, chicane, or overreaching." *McNally v. United States, 483 U.S. 350, 358, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987)* (quoting *Hammerschmidt v. United States, 265 U.S. 182, 188, 68 L. Ed. 968, 44 S. Ct. 511 (1924)* (internal quotation marks omitted). The case law has performed further exegesis on what "deprive" **[*105]** means, with the result that Pimental and the government here dispute whether mail fraud can be a "victimless" crime. As I will explain more fully below, Pimental takes the view that the scheme alleged by the government, though Pimental may (or may not) have gained from it, does not qualify as a scheme to defraud because Pimental's insurers -- who never had to pay out a claim -- were never deprived of anything.

The government reads the case law to support liability under the mail fraud statute where the scheme is intended either to confer an unjust benefit on the defendant or to deprive another of a property right. See *United States v. Czubinski, 106 F.3d 1069, 1074 (1st Cir. 1997)* ("Binding precedents, and good sense, support the conclusion that to 'deprive' a person of their intangible property interest in confidential information under section 1343, either some articulable harm must befall the holder of the information as a result of the defendant's activities, or some gainful use must be intended by the person accessing the information, whether or not this use is profitable in the economic sense."), quoted in *United States v. Jordan, 112 F.3d 14, 19 (1st Cir. 1997).*[3]

Pimental takes a stricter -- and certainly more literal -- view of the term "deprive" to require a showing of harm to the victim. Pimental cites *United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996), United States v. D'Amato, 39 F.3d 1249, 1257 (2d Cir. 1994),* and *United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987),* for this proposition. In Sawyer, the court characterized the usual scenario where the allegation is that the bribery of a public official deprives the public of honest services. The court observed that honest services cases "typically involve either bribery of the official or her failure to disclose a conflict of interest, resulting in personal gain." *Sawyer, 85 F.3d at 724.* It was essentially a zero-sum game: a public official cannot take a bribe and not, as a legal matter, "deprive" the public of honest services in the process.[4] Sawyer's holding certainly did not stand for the principle that in cases not involving "honest services," the defendant's accrual of a benefit to himself, absent a showing of some loss to another, precludes a finding of a scheme to defraud.

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[3] Czubinski, it is important to note, did not turn on this issue. The First Circuit held that the defendant, who accessed an IRS database without authorization, was not liable for wire fraud, as the government made no showing that Czubinski intended either harm to the IRS or any benefit to himself. *Czubinski, 106 F.3d at 1077.*

[4] The out-of-circuit cases are less ambiguous. Although the schemes in D'Amato and Starr both benefited the defendants and harmed their victims, Starr, for its part, asserts that "only a showing of intended harm will satisfy the requirement of fraudulent intent." *Starr, 816 F.2d at 98* (emphasis added).

In any case, I find the same zero-sum game as found in Sawyer to exist here. The charged scheme to defraud is that Pimental made misrepresentations to his insurers toward the end of paying lower insurance premiums than were actually due. The result of this scheme, if it succeeded, would be that Pimental accrued a benefit, lower premiums, and the insurers necessarily suffered a loss, that is, a gap between its actual risk exposure and the premiums it received, which were calculated to correspond to a lower risk exposure. The question whether the government may prove mail fraud with a mere showing of benefit accrued to the defendant -- and no showing of intended harm to victims -- is therefore not material to this case.

Pimental further challenges the claim that he got a benefit at all. Pimental **[*106]** paid the insurance premiums due for concrete construction. There is no evidence to suggest that he obtained coverage for any work activities other than the concrete foundation work. In sum, Pimental argues that he "got what he paid for," that is, he purchased workers' compensation insurance for concrete rebar work, but no coverage was necessarily extended for the workers on his steel erection and other projects -- which the evidence suggested comprised all of his business. His business was therefore under-insured, perhaps in violation of Chapter 175A, the state workers' compensation statute, but he did not commit federal mail fraud, because under Chapter 175 of the Massachusetts General Laws, an insurance policy is voidable upon a showing that a policyholder's misrepresentation was material to its issuance. Mass. Gen. Laws. c. 175, § 186.

But Pimental misperceives the law. Under workers' compensation law -- as opposed to insurance generally -- Pimental's insurers could not refuse coverage for an on-the-job accident. Workers' compensation law works differently in this respect. As the government rightly observes, under state workers' compensation law, an insurer must provide coverage to an insured's employees regardless of whether the workplace risk was accurately reflected in the employer's premium payments. See *Employers Mut. Liability Ins. Co. of Wisconsin v. Merrimac Mills Co., 325 Mass. 676, 681, 92 N.E.2d 256 (1950)* (finding the plaintiff insurance company entitled to additional workers' compensation premiums to account for activities the employer **[**18]** failed to acknowledge to the insurer in earlier declarations, because the plaintiff would have been required to extend coverage for injuries in those activities); *Phalen's Case, 271 Mass. 371, 373-34, 171 N.E. 438 (1930)* ("If the claimant was covered by the policy, it was not material whether the insurer, had it known of the operation of the gravel pit, would have charged a higher premium or assigned a different classification in the policy."). That is, the insurer is bound to extend coverage to all injuries sustained on the job, and not only to those sustained by workers discharging tasks within the scope of the job classification code the employer has selected.

Pimental notes further that even if I were to require a finding of loss to the victim, there is no such loss here or intended loss. Heightened risk, he claims, is not enough. See *United States v. Tobin, 28 F. Supp. 2d 674, 677 (D. Mass. 1998)*. The defendant in *Tobin* was convicted of mail fraud for understating payroll amounts to his workers' compensation insurer, thereby obtaining reduced premiums. *Tobin, 28 F. Supp. 2d at 675-76.* In its assessment of restitution costs, the *Tobin* court refused to treat as "actual loss" the gap between the premiums Tobin owed and what he actually paid; it held instead that the proper amount of restitution was the measure of "the amount of the claims paid under the policy." *Id. at 677.*

Because Pimental made no claim on the policies in this case, he argues that *Tobin* warrants a finding that there was no actual or intended loss to the insurer, and therefore no scheme to defraud. However, "actual loss" for restitution purposes and the requirements of a scheme to defraud are two different things. The *Tobin* court did not accept the gap in premiums as a viable restitution amount because the value of the policy was too difficult to quantify. See *id.* ("The Court concludes that the 'value' of the insurance coverage is too abstract and uncertain under the circumstances of this case to constitute lost property for purposes of calculating restitution under section 3663 or 3663A.") Mail fraud liability, which is routinely predicated on a "deprivation of honest services" **[*107]** theory, see, e.g., *United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996),* does not require that the harm be quantifiable.

Even if the policies were voidable under the law, it does not follow of necessity that there was no improper gain to Pimental or harm to the insurer. The fact that the policies were voidable suggests that there was a harm, but it was redressable in a civil suit. In any event, nothing in the mail fraud statute suggests that it was meant to exclude all schemes that intend harms otherwise redressable.

Indeed, while it may well be that this case was more appropriately brought in a state civil court by the insurer, see *Tobin, 28 F. Supp. 2d at 677 n.4* (rejecting the prosecution's premium-based restitution theory, suggesting that the insurer file in state court to recover expectation damages, and noting that "Congress did not intend that the government's limited prosecutorial resources be marshaled to secure the benefit of the bargain to insurance companies"); *Employers Mutual, 325 Mass. at 681* (providing a remedy for private insurers when employer declarations understate their ~~risk), th~~at cannot frame the issues under Rule 29. The government, after all, secured a mail fraud conviction in the Tobin case on a similar theory. In *Tobin*, admittedly, the insurers paid *Tobin* on a claim. But as the government needs to show a scheme to defraud -- and not actual defrauding -- the distinction is not material. There is evidence to support the jury's conviction that Pimental would have sought coverage for an employee's injury while performing steel erection work, even though the premiums he paid covered the less dangerous category.

Pimental also argues -- and correctly -- that the insurers were not necessarily entitled to higher premium payments than he actually made. It is clear from the evidence that Pimental's employees performed various tasks; the Workers' Compensation Rating and Inspection Bureau issued a report affirming this. Pimental repeatedly assigned an across-the-board "concrete construction" classification code to his business. He did not allocate his employees' various tasks among different classification codes, as he was entitled to do under the law. Though the insurance rate for some of the work -- the erection of steel frames -- was over twice as high as it was for "concrete construction," other tasks, like decking, welding, and sheet-metal work, were much cheaper to insure. Depending on the number of hours his employees spent on each task -- and the government offered no evidence on this point -- Pimental might well have paid higher premiums than were required of him.

But again, the required proof is of an intent to defraud. There was sufficient evidence before the jury to permit an inference that Pimental made misrepresentations about the nature of his work with the intent to pay less than he owed to the insurance company. The scheme may have failed in its execution -- it is possible that Pimental paid higher premiums than he should have, had he broken down his business by task. The insurers may not have lost a cent as a result of Pimental's misrepresentation of his work as "concrete construction." But the scheme to defraud need not have been successful in depriving the victim of property or securing a benefit to the schemer, see *Neder v. United States, 527 U.S. 1, 24-25, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1997);* Pimental needs only to have intended that consequence.

The scheme to defraud that the government alleged -- and the jury found -- revolves around Pimental's alleged intention that his insurers bear greater risk at lower premium rates. Whether or not the insurers **[*108]** actually had to pay a claim or were paid a penny less in premiums than they were entitled to have, I cannot find that there was insufficient evidence before the jury to support its conclusion that Pimental harbored that intent.[5]

2. Use of the Mails

Substantially more compelling is Pimental's challenge to the mailing elements of his convictions. The mail fraud statute "does not purport to reach all frauds, but only those limited instances in which the use of the mails is part of the execution of the fraud." *Kann v. United States, 323 U.S. 88, 95, 89 L. Ed. 88, 65 S. Ct. 148 (1944).* Accordingly, the government must show beyond a reasonable doubt that Pimental caused the mailings listed in the indictment to be sent and that the mailings were in furtherance of the fraud.

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[5] The possibility that the Pimentals overpaid their insurers may provide the otherwise elusive explanation for the USAO's prosecution of this case. As I have said, a state-court civil remedy was available to the Pimentals' insurers. But then again, a civil claim would have no force if, as is quite likely in this case, the insurers could not prove actual damages. Federal mail fraud is a better bet for the Insurance Fraud Bureau, as it does not require a showing of actual harm, as long as a jury is convinced that Pimental intended to pay lower premiums than were required of him. It is indeed ironic that Pimental is exposed to criminal penalties notwithstanding that -- and perhaps because -- the "victim" insurers might recover nothing from him in a civil suit.

To establish causation, a defendant need not make the mailing himself -- it is sufficient that the mailing was a consequence known or reasonably foreseeable to him. *United States v. Serafino, 281 F.3d 327, 333 (1st Cir. 2002).* The "in-furtherance" component has a bit more bite. Although "use of the mails need not be an essential element of the scheme," it is the prosecutor's task to show that the "mailing is part of the execution of the scheme as conceived by the perpetrator at the time." *Schmuck v. United States, 489 U.S. 705, 710-11, 715, 103 L. Ed. 2d 734, 109 S. Ct. 1443 (1989)* The First Circuit's gloss on the in-furtherance element requires that "'the scheme's completion or the prevention of its detection must have depended in some way on the mailing.'" *United States v. Pacheco-Ortiz, 889 F.2d 301, 305 (1st Cir. 1989)* (quoting *United States v. Pietri Giraldi, 864 F.2d 222, 224 (1st Cir. 1988)* (emphasis added).

Pimental suggests that neither of the mailings for which he was charged and convicted were in furtherance of the scheme as charged or reasonably foreseeable to him at the time they were sent. I will examine each mailing in turn.

a. Count 2: The October 5, 1994 "Account Data Report"

The mailing described in Count 2 of the indictment is an "Account Data Report," prepared and dated October 5, 1994, detailing the findings of Bill Brooks, an independently contracted "loss control" inspector to Pimental's insurer at the time, Hartford Fire Insurance Company ("Hartford"). The October 5 Report memorialized Brooks' meeting with Pimental the day before, wherein the latter described the nature of his business. Evidence was given that the typed Report was mailed to Hartford.

Brooks' business as a loss control inspector had nothing to do with the determination of premiums: it was to identify potentially hazardous conditions on Pimental's work sites and make recommendations to minimize the risk of accidents. The mailing reports that at the October 4 meeting, Pimental told Brooks that his business was to install steel-reinforced concrete, and that he had no jobs in progress. **[*109]** Brooks was therefore unable to visit any work sites.

Pimental argues that there was insufficient evidence to prove, beyond a reasonable doubt, that Brooks' preparation of his Report and subsequent mailing of it to Hartford were reasonably foreseeable to Pimental. The government counters that Brooks took notes at the meeting, such that Pimental could reasonably have believed that a report was to be prepared for mailing to his insurance company. Moreover, mailing was a reasonably foreseeable mode of delivery, given the insurance company's Connecticut location. The causation element is so liberally construed that I have to agree that the mailing of the Account Data Report was foreseeable to Pimental.

I am convinced, however, that the mailing was not "in furtherance of the fraud." The government notes that a mailing that enables the continuation of a scheme to defraud establishes the jurisdictional element of mail fraud. See *Schmuck v. United States, 489 U.S. 705, 711-12, 103 L. Ed. 2d 734, 109 S. Ct. 1443 (1989).* The defendant in Schmuck maintained a scheme of rolling back the odometers on used cars and selling them to car dealerships at prices that reflected the lower mileage. The mailings charged against Schmuck were title application forms sent to the state by the car dealerships following their resale of the cars. The Court held:

> Although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in

> turn was essential to the perpetuation of Schmuck's scheme.

Id. at 712. Framed another way, as the First Circuit has done in Pacheco-Ortiz, sustaining the scheme "depended on" the mailing of those title applications. *Pacheco-Ortiz, 889 F.2d at 305;* see also *United States v. Castillo, 829 F.2d 1194, 1198* (affirming a mail fraud conviction based on certain telex transmissions because "if any one of them had not been sent, Fermin would not have received his ill-gotten gains").

The mailings in Schmuck and Pacheco-Ortiz are clearly distinguishable from the Account Data Report in this case. Reports like Brooks' are routinely prepared by loss control inspectors for the purpose of minimizing the risk of accidents in the workplace -- or at least satisfying insurers that efforts have been taken toward that end. Though Brooks' Report contains statements from Pimental consistent with the scheme to defraud alleged in the indictment, the scheme in no way depended on the relay of those statements from Brooks to Hartford.

It is indeed possible that a Report from Brooks that described Pimental's work as steel erection might have raised an eyebrow, found its way to the department at Hartford that actually did determine Pimental's premiums, and resulted in an upward adjustment in his premiums, so thwarting the alleged scheme to defraud. But there is no evidentiary basis for the jury to believe that, had the Report of loss control inspector Brooks -- whose business is not remotely concerned with the process of determining premiums -- not been sent to Hartford, the jig would have been up and Hartford would have increased Pimental's premium payments. This is the standard described and applied in Schmuck and Pacheco-Ortiz: the mailing must be "incident to an essential part of the scheme." *Schmuck, 489 U.S. at 710-11.*

The government gave no evidence that this letter was incidental to the derivation **[*110]** of Pimental's premiums. Nor is there any evidence to suggest that, absent any confirmation from loss control inspectors that Pimental did "concrete construction," any investigation into the veracity of his choice of job classification codes would ensue.[6] Accordingly, no rational jury could gather from the government's evidence that the mailing of Brooks' report was at all connected to an essential part of the scheme.

b. Count 4: The October 5, 1995, Letter from Hartford to Pimental

The jury also convicted Pimental of Count 4 of the revised indictment. The mailing featured in this count was an October 5, 1995 letter from Timothy J. Bergeron, a second loss-control inspector,[7] to Pimental himself. The mailing memorialized Bergeron's visit with Pimental on terms and under circumstances similar to Brooks'.

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[6] In fact, the loss control expert "confirmed" nothing. He visited no work sites and merely accepted Pimental's representations. No further investigation followed.

[7] It is no coincidence that the government came away with convictions on the two counts that featured mailings from loss control inspectors. At the end of his final argument, the prosecutor landed hard on the Pimentals for the information they gave loss control inspectors, insinuating that the Pimentals willingly forfeited opportunities to work with loss control inspectors to improve worker safety. The Pimentals moved for a mistrial on the ground that this was an improper, prejudicial argument; there was no indication that worker safety was ever compromised on the Pimental's job sites. I denied the motion.

Pimental again disputes the causation element. The government suggests that Bergeron's use of the mails was indeed reasonably foreseeable to Pimental, as he had already received two letters from Bergeron planning the meeting. It does not follow from the fact of those letters that Pimental could expect a letter after the meeting memorializing what had transpired. Nonetheless, the government need only prove that "use of the mails," and not the particular mailing at issue, was reasonably foreseeable. *Fermin Castillo, 829 F.2d at 1198-99.* Here again, I cannot overrule the jury's determination that this was, in fact, the case.

But no rational jury could have concluded that this mailing was in furtherance of the fraud. Bergeron's letter is even further removed from Pimental's scheme than Brooks'. Bergeron made his visit in the same capacity, and for the same purpose, as Brooks did -- not to verify that Pimental was paying the appropriate premiums, but to review work sites and offer suggestions to minimize work hazards. Pimental may indeed have misled Bergeron about the nature of his construction business, and the contents of Bergeron's letter may reflect Pimental's misrepresentations. But the scheme described in the indictment cannot remotely be viewed to depend on the mailing of Bergeron's "confirmation letter" to Pimental.

B. The Rule 6(e) Motion

As Pimental had no constitutional right to secrecy at the grand jury stage, the harmless error standard of *Federal Rule of Criminal Procedure 52(a)* governs in this case. *United States v. Mechanik, 475 U.S. 66, 71-72, 89 L. Ed. 2d 50, 106 S. Ct. 938 (1986).* Dismissal of an indictment is therefore appropriate only if a Rule 6(e) violation "substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence" of the violation. *Bank of Nova Scotia* *v. United States, 487 U.S. 250, 256, 101 L. Ed. 2d 228, 108 S. Ct. 2369 (1988).*

[*111] Pimental advances four new arguments -- based on evidence' adduced at trial -- that the Rule 6(e) violation substantially influenced the grand jury to indict.

First, Pimental argues that the bank records reviewed by the grand jury "did not speak for themselves." Some explanation of the records, Pimental suggests, was required to distill the several boxes of records into payroll figures -- in fact, it was not clear from the face of the records that the bank records even referenced payroll accounts. The U.S. Attorney's Auditor, Tom Zappala, testified at trial to the time and expertise required to ascertain payroll figures from the boxed records. The grand jury did not have Zappala's expertise, and he did not testify before the grand jury: Faragi did, with his spreadsheet summaries.

Second, Pimental contends that Faragi, tagged by the prosecution as an expert witness of workers' compensation law, misled the grand jury. Specifically, Faragi failed to inform the grand jury that Pimental was entitled to parse out his operations among multiple job classification codes. Pimental suggests that the trial testimony of the FBI agent on this case, the three insurance company auditors called as witnesses, and a state workers' compensation board representative all recognized this possibility. Thus the evidence at trial exposed Faragi as something less than an expert for not suggesting this to the grand jury.

Third, Pimental finds fault with the spreadsheets Faragi prepared that allegedly juxtapose his company's actual payroll to the payroll reported to his insurers. Faragi testified a number of times that Pimental's actual payroll was lower than he reported to his insurance auditors. Pimental protests that he was never required to make such reports, and the totals that Faragi identifies as "reported" payroll were actually numbers that the auditors derived from Pimental's records. That many of the numbers posted by Faragi were estimates -- and certainly not figures that Pimental volunteered or necessarily accepted as true -- is a fact buried in footnotes to the spreadsheets. As a result, Pimental contends that Faragi misled the grand jury in suggesting that he "underreported" his payroll.

Fourth and finally, Pimental takes issue with Faragi's testimony to the grand jury overstating the number of mailings relating to Pimental's scheme to defraud. One member of the grand jury had expressed interest in whether the Pimentals themselves had mailed anything in furtherance of the scheme. Faragi testifed that Pimental mailed premium checks to the insurance companies, that Pimental mailed bids to potential clients, and finally that "there are probably hundreds of mailings." The government offered at trial no evidence of any mailings between Pimental and his insurers.

It is the government's view that the conviction in this case mandates a finding of harmless error on the Rule 6(e) violations. It relies upon *United States v. Mechanik, 475 U.S. 66, 89 L. Ed. 2d 50, 106 S. Ct. 938 (1985),* where the Supreme Court found that a subsequent guilty verdict at trial sanitized a Rule 6(d) violation at the grand jury stage. *Id. at 70.* The Court took the view that the petit jury's satisfaction of guilt beyond a reasonable doubt presumes that probable cause, at the very least, supported the indictment. Id.

It is worth noting, however, that the defendant in Mechanik challenged grand jury proceedings that led to a superseding indictment. A prior grand jury had charged Mechanik with drug offenses and conspiracy; the second, contested grand jury proceeding resulted in an expansion **[*112]** of the scope of the conspiracy charge. *Id. at 67.* As a result, the defendant's Rule 6(d) motion to dismiss faulted proceedings that resulted in the broadening of the indictment, and not the very decision to indict. *Id. at 69* ("We assume for the sake of argument that the simultaneous presence and testimony of the two Government witnesses before the grand jury violated Rule 6(d), and that the District Court would have been justified in dismissing portions of the indictment on that basis had there been actual prejudice . . . (emphasis added)). This fact clearly made a difference to the majority, which emphasized the social costs of retrying the case under the first indictment. *Id. at 72.*

The inference the government would draw from Mechanik is that, as long as the government can muster sufficient evidence to secure a guilty verdict at a later date, the strictures of Rule 6 are voluntary for the prosecution. In a concurring opinion critical of the majority's view, Justice O'Connor recognized that it is a rare case that entertains a post-verdict motion to dismiss an indictment under Rule 6. *Id. at 76* (O'Connor, J., concurring). The free rein that the government's reading of Mechanik would give to prosecutors is therefore constrained by the risk that the defense will uncover prejudicial violations prior to trial. But if the jury trial's full airing of the issues reveals, for the first time, the full scope and effect of the violation, and -- as is arguably the case here -- that new information warrants a finding, under Bank of Nova Scotia, that the violation substantially influenced the decision to indict and not merely the composition of the indictment, extension of Mechanik[8] to deny a remedy to the defendant would be unjust and unwarranted.

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[8] For that matter, the Supreme Court has emphasized the importance of case-by-case attention to the particulars of an alleged error over mechanical application of per se rules in the harmless error analysis. *United States v. Lane, 474 U.S. 438, 447-48, 88 L. Ed. 2d 814, 106 S. Ct. 725 (1986);* see also *Mechanik, 475 U.S. at 77* (O'Connor, J., concurring) (noting the Court's distaste for per se rules in the harmless error context).

I agree with Justice O'Connor. A petit jury's guilty verdict, reached after a full development of the evidence, says nothing about the strength of a prosecution's case at the time of indictment. The majority's suggestion that it does is flawed logic, and worse, it strikes a blow at the core principle of the grand jury process, which is directed at ensuring that defendants are not charged with crimes unless and until the government has mustered at least a germ of a case. *Id. at 73-74* (suggesting that the majority's decision "seriously undermines the grand jury's traditional function of protecting the innocent from unwarranted public accusation".).

In any case, Mechanik certainly does not go so far as to suggest that a jury verdict I have found to be unsupported by the evidence necessarily establishes harmless error, particularly where the defects in the trial proof had nothing to do with Faragi's testimony. Nevertheless, I have set aside the guilty verdicts under Rule 29. As the government failed to prove its case, the question of dismissal under Rule 6 is moot. *Mechanik, 475 U.S. at 77* ("If the jury acquits, the matter is mooted.").

III. CONCLUSION

For the foregoing reasons, Arthur Pimental's Second Supplemental Memorandum in Support of Motion to Dismiss Indictment for Violation of Rule 6 [docket entry # 121] is **MOOT**, and Defendant's **[*113]** Rule 29 Motion [docket entry # 120] is **GRANTED**.

SO ORDERED.

Dated: December 19, 2002

NANCY GERTNER, U. S.D.J.

APPENDIX C

DISTRICT COURT'S OPINION DENYING PETITIONER'S MOTION TO DISMISS THE INDICTMENT

UNITED STATES OF AMERICA, v. ARTHUR L. PIMENTAL and LORETTA R. PIMENTAL, Defendants.

Criminal No. 99-10310-NG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

204 F.R.D. 223; 2001 U.S. Dist. LEXIS 20957

December 3, 2001, Decided

JUDGES: NANCY GERTNER, U.S.D.J.

OPINION BY: NANCY GERTNER

OPINION: [*224] MEMORANDUM AND ORDER RE: DEFENDANTS' MOTION TO DISMISS

December 3, 2001

On February 20, 2001, I ruled that the government had violated *Fed. R. Crim. P. 6(e)* ("Rule 6(e)) when it disclosed secret grand jury materials to private investigators from the Massachusetts Insurance Fraud Bureau ("the IFB") in connection with the investigation of the defendants, Arthur L. Pimental and Loretta R. Pimental, ("the Pimentals"). *United States v. Pimental, 199 F.R.D. 28 (D. Mass. 2001)*("Pimental I").

On April 3, 2001, I addressed the government's motion to reconsider that decision. I spelled out in further detail my conclusion that there had been a 6(e) violation. *United States v. Pimental, 201 F.R.D. 24 (D. Mass. 2001)*("Pimental II"). I rejected the government's insistence that phrase "government personnel" in the Rule somehow meant "privately employed personnel" or "private experts under contract with the government." I called for further briefing on the following two questions, a) whether the Court must find the government violated Rule 6(e) "knowingly," or in the alternative, in "bad faith," before I may explore the question of the appropriate remedy through further discovery; b) whether the government's violation was in fact "knowing" or in "bad faith.

In my Order Re: Government's Motion for Reconsideration, Crim. No. 99-10310-NG (June 4, 2001)("Pimental III"), I answered those questions. I concluded that the defendants would be entitled to relief for the Rule 6(e) violation, whether or not the government's actions were knowing or in bad faith. The appropriate standard for relief was the "harmless error" standard of Rule *Fed. R. Crim. P. 52(a)*, a standard that looked to the impact of the violation on the grand jury's decision, and not to the government's conduct.

Finally, I concluded that the government's violation of the rule was not a "knowing" violation. My ruling that the government's disclosure practices violated Rule 6(e) required "a lengthy analysis and a consideration of numerous factors," after a full adversary hearing. "The attorneys for the government were entitled to hold, and aggressively assert" a contrary position, especially in the light of the district court's past practice of "signing off on the government's disclosures." Pimental III, p. 11.[1]

The only issue remaining was the question of whether the government's 6(e) violation prejudiced the Pimentals within the meaning of Rule 52(a) and the appropriate remedy. The Pimentals called for dismissal or suppression of the evidence in the grand jury's possession that the government provided to non-governmental personnel in order to punish the government for transgressing Rule 6(e) and the privacy interests that it protects.

Although I am sympathetic to the Pimentals' plight, I cannot grant them the relief that they request. Since the government has shown under the harmless error test of *Federal Rule of Criminal Procedure 52(a)* ("Rule 52(a)") that its Rule 6(e) violation did not substantially affect the grand jury's decision to indict the Pimentals, I am obliged to deny the motion. For this reason, and for the reasons explained in greater detail below, the Pimentals' motion to dismiss or in the alternative, to suppress certain evidence [docket entry # 39] is **DENIED.**

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[1] Of course, I noted that future applications will be subject to a different standard:. . .

I must take this opportunity to impress upon the government its heightened burden to inform the district court of the current state of statutory and decisional law, even non-controlling precedent, when the government proceeds on an ex parte basis. . . . While I find the government's conduct in the instant case was not sanctionable as a contempt of court, the need for the government to remain vigilant, and to responsibly shoulder the burdens accompanying its special role in the criminal process, remains constant.

Pimental III, supra at 12-13.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Pimentals, who are husband and wife, own and operate a steel business together. The government alleges that the Pimentals defrauded their insurers by misrepresenting the type of work performed by their employees **[*225]** and under-reporting their employees' salaries in order to receive lower Workers' Compensation premiums.

Although the investigation later involved agents from the Federal Bureau of Investigation ("FBI") and was prosecuted by the United States Attorney's Office ("USAO"), private investigators from the Insurance Fraud Bureau of Massachusetts ("IFB"), a private investigatory agency that receives 100% of its budget from private insurance companies, performed the preliminary investigation into the matter.[2]

During the course of the investigation into the Pimentals, a federal grand jury subpoenaed certain bank records of the Pimentals, presumably to determine if the Pimentals had been fraudulently understating the size of their payroll. The USAO subsequently filed an ex parte motion seeking to disclose grand jury materials to IFB investigators as "outside experts assisting" in the investigation. The USAO made the request pursuant to Rule 6(e)(3)(A)(ii), which authorizes disclosure to "such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." *Fed R. Crim. P. Rule 6(e)(3)(A)(ii).* Judge Saris summarily granted the government's motion by signing a form order submitted by the government.

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[2] As I indicated the "IFB inhabits a region of the private/public spectrum that is much closer to a purely private agency. First, the IFB receives 100% of its budget from private insurance companies. All IFB employees, therefore, receive their salaries directly from the insurance associations (i.e., the AIB and WCRIB). Second, neither the state of Massachusetts nor the federal government exercises administrative control over the IFB and its policies. The state officials serving on the IFB board cannot exercise control over the IFB; they represent a select minority of board members. . . . Indeed, private interests govern the IFB's operations. Third, IFB investigators do not operate under the control and direction of the USAO or the Commonwealth."

Pimental I, supra at 33.

The USAO then disclosed the bank records obtained by the grand jury's subpoena to Scott Faragi ("Faragi"), an IFB investigator who was investigating the Pimentals. Faragi later testified before the grand jury concerning the Pimentals. His testimony, which comprised a majority of the testimony[3] consisted both of testimony in general concerning how the insurance industry worked as well as testimony addressing the Pimentals more specifically. In particular, he summarized and characterized the information contained in the Pimentals' bank records both orally and in the form of a spreadsheet provided to the grand jury. Subsequently, the grand jury voted to indict the Pimentals and charge them with one count of conspiracy, in violation of *18 U.S.C. § 371,* and fourteen counts of mail fraud, in violation of *18 U.S.C. § 1341.*

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[3] Faragi was one of four witnesses who appeared before the grand jury. His testimony comprises 126 pages of the 204-page grand jury transcript.

On July 17, 2000, the Pimentals moved to dismiss the indictment against them on the Rule 6(e) violation. On February 20, 2001, I issued an Order agreeing that the government had violated the Rule when it had provided materials obtained through the grand jury's subpoena power to IFB agents, including Faragi. "*Pimental I*". I also ordered the government to provide the Pimentals with discovery relating to the government's violation, including all documents and information relating to secret grand jury materials improperly provided to IFB agents.

In a subsequent June 4, 2001, Order on the government's motion for reconsideration of my February 20, 2001, ruling, *Pimental III*, I found that the appropriate standard governing the Pimentals' motion to dismiss the indictment was the "harmless error" standard of Rule 52(a) as identified in *Bank of Nova Scotia v. United States, 487 U.S. 250, 256, 101 L. Ed. 2d 228, 108 S. Ct. 2369 (1988).*

Thereafter, both sides filed supplemental memoranda addressing the appropriate remedy, if any, for the government's Rule 6(e) violation. I held a hearing addressing the arguments raised in these briefs and the underlying motion to dismiss on November 7, 2001.

[*226] II. LEGAL ANALYSIS

A. Standard For Dismissal And Burden Of Proof

As I explained in Pimental III, the harmless error test provided in Rule 52(a) determines whether dismissal of an indictment is an appropriate remedy for a nonconstitutional error such as the government's violation of Rule 6(e).[4] *U.S.*

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[4] Rule 52(a) provides in full: "Any error, defect, irregularity or variance which does not effect substantial rights shall be disregarded." *Fed. R. Crim. P. 52(a).*

v. Mechanik, 475 U.S. 66, 71-72, 89 L. Ed. 2d 50, 106 S. Ct. 938 (1986); Bank of Nova Scotia, 487 U.S. at 254 (applying the "harmless-error inquiry prescribed by *Federal Rule of Criminal Procedure 52(a)*"). Under the harmless error test applied to nonconstitutional violations involving grand jury proceedings, "dismissal of the indictment is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia, 487 U.S. at 256.* If the Rule 6(e) violation was not a knowing and bad faith violation of the rules, and did not prejudice the defendants, I may not dismiss the indictment against them.[5]

The Supreme Court has also made clear that under the harmless error analysis of Rule 52(a), the government bears the burden of proving an absence of prejudice to the defendant. See *United States v. Olano, 507 U.S. 725, 734-35, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993).* In Olano, the Court distinguished Rule 52(a)'s harmless error test with Rule 52(b)'s plain error test. When a court applies the two rules, it should perform "the same kind of inquiry, with one important difference: It is the defendant [under Rule 52(b)] rather than the Government who bears the burden of persuasion with respect to prejudice." *Olano, 507 U.S. at 734.* The Court defined Rule 52(a)'s harmless error standard as "whether the Government could have met its burden of showing the absence of prejudice, under Rule 52(a)." *Id. at 741* (emphasis added). See also *United States v. Mojica-Baez, 229 F.3d 292, 307 (1st Cir. 2000)* (recognizing that under Rule 52(a)'s harmless error test, "the government bears the burden of showing that an error did not result in any prejudice.")[6]

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[5] This case where the government unknowingly violated a nonconstitutional rule is not one where "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Bank of Nova Scotia, 487 U.S. at 257.* See *Vasquez v. Hillery, 474 U.S. 254, 260-264, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986)* (racial discrimination in selection of grand jury compelled dismissal of indictment); *Ballard v. United States, 329 U.S. 187, 91 L. Ed. 181, 67 S. Ct. 261 (1946)* (exclusion of women from grand jury necessitated dismissal of indictment).

Nor is it a case in which there was such a knowing and bad faith violation of grand jury rules that the integrity of the proceedings was compromised.

Relying heavily on First Circuit cases which advise caution before dismissing a grand jury indictment, the government argues that the defendant, not the government, should bear the burden of proving prejudice under the harmless error test of Rule 52(a). See generally, *United States v. Li, 206 F.3d 56, 62 (1st Cir. 2000)* (stating that "dismissing an indictment is an extraordinary step"); *United States v. Giorgi, 840 F.2d 1022, 1030 (1st Cir. 1988)* (instructing courts to "be reluctant to dismiss an indictment.") However, although these cases compel a heightened vigilance when applying the Rule 52(a) test, they do not contradict the Supreme Court's clear command that the government bears the burden of proving an absence of prejudice **[*227]** to the defendant under this analysis.[7]

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[6] As one commentator describes it, "the harmless error provision (Rule 52(a)), normally, although not always, operates in favor of the prosecution" and "requires the . . . court to disregard technical defects in the proceedings below . . . if the errors did not affect the substantive rights of the parties. On the other hand, the plain error provision (Rule 52(b)), normally benefitting the criminal defendants, allows a reviewing court to consider errors in the proceedings below even if the injured party failed to properly preserve the error for review, by failing to object in a timely fashion." *57 A.L.R. Fed. 521,* § 2 (1999).

B. Applying the Rule 52(a) Harmless Error Standard

Under the Bank of Nova Scotia test, the critical question is whether "the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia, 487 U.S. at 256.* In other words, prejudice must relate directly to the grand jury's decision to find probable cause and indict the Pimentals. Put otherwise, if the evidence improperly before the grand jury due to the government's Rule 6(e) violation is excised, will the evidence properly before the grand jury amply support its finding of probable cause and decision to indict?[8]

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[7] It is logical that the government should bear the burden of proving an absence of prejudice under this test. It was the government's violation of Rule 6(e) that caused the error to begin with, and the defendants raised a timely objection to this error before their trial commenced. As a matter of fairness, the government should not be able to violate the defendants' rights to secret grand jury proceedings and then dump its misconduct onto the defendants' laps and demand that they prove how this violation hurt them.

Moreover, typically, the party bearing the burden of proof is the party seeking to assert the disfavored contention -- here that a violation of the Rules should be excused.

[8] In some respects, Rule 52(a)'s prejudice analysis which focuses only the effect that the error may have had on the grand jury's decision to indict seems inadequate to safeguard at least one of the purposes of secrecy provisions of Rule 6(e)- "to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation." *Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 n.10, 60 L. Ed. 2d 156, 99 S. Ct. 1667 (1979).* If prosecutors

This approach of examining the validity of the grand jury's result after subtracting out the impact of any tainted evidence is precisely the same Rule 52(a) harmless error analysis that an appellate court routinely performs when reviewing a verdict after a trial jury improperly has received extra-record information. See *United States v. Santana, 175 F.3d 57, 66* (finding that to determine whether a trial jury's consideration of extrinsic evidence constituted harmless error, a reviewing court should "assess the record as a whole to determine the impact of the improper evidence upon the jury . . . . The prejudicial effect of the improper evidence must be weighed against the weight of the properly admitted evidence"), quoting *Lacy v. Gardino, 791 F.2d 980, 986 (1st Cir. 1986); Morgan v. Hall, 569 F.2d 1161, 1166 (1st Cir. 1978)*. See also *United States v. Weiss, 752 F.2d 777, 783 (2nd Cir. 1985)* (advising courts to "assess the possibility of prejudice by reviewing the entire record, analyzing the substance of the extrinsic evidence, and comparing it to that information of which the jurors were properly aware.")

In his subsequent testimony before the grand jury, Faragi testified generally about the insurance industry. Faragi also provided the grand jury with an oral summary of the Pimentals' bank records as well as a spreadsheet summarizing them, records with which he had been provided in violation of Rule 6(e). While the Pimentals do not allege that Faragi summarized these documents in a false or

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violate Rule 6(e) by disclosing secret grand jury materials, but these disclosures do not affect the grand jury's deliberations, the defendant cannot obtain the individualized remedy of dismissal for this assault against his privacy. Nevertheless, a court may still punish any individual responsible for a knowing or bad faith violation of Rule 6(e) through the use of its contempt power, regardless of whether the violation affected the grand jury's decision to indict.

misleading way, they argue that this summary evidence, which was before the grand jury as a result of the government's decision to provide Faragi with these records, prejudiced them by substantially affecting the grand jury's decision to indict them.

After considering the entire record of the evidence and proceedings before the grand jury, I conclude that the government has met its burden of demonstrating that the introduction of this improper summary evidence did not prejudice the Pimentals. In arriving at this conclusion, I am obliged to distinguish between Faragi's testimony and spreadsheet summarizing the bank records, on the one hand, and the bank records themselves, on the other. While the Pimentals correctly point to the bank record summary evidence **[*228]** provided by Faragi as tainted by the government's Rule 6(e) violation, the underlying bank records themselves were properly before the grand jury. They had been obtained by a grand jury subpoena. In any case, the grand jury could fairly consider Faragi's expert testimony about the insurance industry in general (as opposed to his summary evidence of the Pimentals' bank records) because his ability to provide this testimony did not flow from the government's Rule 6(e) violation.

Taken together, Faragi's general expert testimony about the insurance industry plus the underlying bank records without Faragi's testimony or the spread sheet fully support the grand jury's probable cause determination and decision to indict the Pimentals. Therefore, the government's Rule 6(e) violation cannot have "substantially affected" the grand jury's decision to indict or have changed the determination that the grand jury would have arrived at if the tainted evidence had not been introduced, particularly where this tainted evidence did nothing but accurately summarize evidence fairly before the grand jury.[9]

For similar reasons, I must deny the Pimentals' request to suppress the bank records disclosed to Faragi at their trial. The grand jury received the Pimentals bank records through an appropriate use of its subpoena power. The fact that the government wrongly gave Faragi access to these records does not cast an irrevocable taint upon the records themselves.

III. CONCLUSION

For the reasons stated above, the Pimentals' motion to dismiss or in the alternative, to suppress certain evidence [docket entry # 39] is **DENIED.**

SO ORDERED.

Dated: December 3, 2001

NANCY GERTNER, U.S.D.J.

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[9] Even if I were to decide that the government's 6(e) violation had prejudiced the Pimentals and dismissed the indictments against them, I could not grant the Pimentals' request to dismiss the indictments with prejudice without a showing of a knowing violation or bad faith conduct by the government. Because I have already found that the government's conduct in this instance was not in bad faith, any potential dismissal would be need to be without prejudice, leaving the government free to seek indictments against the Pimentals based upon the same underlying conduct.

ORDER RE: DEFENDANTS' MOTION TO DISMISS

For the reasons set forth in the accompanying Memorandum and Order, the Pimentals' Motion To Dismiss or in the alternative, to suppress certain evidence [docket entry # 39] is **DENIED.**

SO ORDERED.

Dated: December 3, 2001

NANCY GERTNER, U.S.D.J.

APPENDIX D

DISTRICT COURT'S OPINION ON GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE SCOPE OF DISCOVERY

UNITED STATES OF AMERICA, v. ARTHUR L. PIMENTAL and LORETTA R. PIMENTAL, Defendants.

Criminal No. 99-10310-NG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

201 F.R.D. 24; 2001 U.S. Dist. LEXIS 6977

April 11, 2001, Decided

JUDGES: NANCY GERTNER, U.S.D.J.

OPINIONBY: NANCY GERTNER

OPINION: **[*24]**

PROCEDURAL ORDER RE: GOVERNMENT'S MOTION FOR RECONSIDERATION

April 11, 2001

For the reasons discussed below, the Court **STAYS** its February 20, 2001, Order compelling the government to produce Rule 6(e) discovery to the defendants, Arthur L. Pimental and Loretta R. Pimental ("the Pimentals"). After considering the oral arguments of counsel, the Court wishes to narrow the issues which need to be briefed. The parties are **ORDERED** to submit supplemental briefs on the following two issues: (1) Whether the Court must find the government "knowingly" violated Rule 6(e), or in the alternative, disclosed grand jury materials in "bad faith," before I may explore the question of the appropriate remedy through further discovery; and (2) whether the government's violation in the Pimental investigation was "knowing" or in "bad faith."

I. BACKGROUND

On April 3, 2001, I held a hearing on the government's motion to reconsider my February 20, 2001, decision ordering the government to produce discovery regarding the government's violation of *Fed. R. Crim. P. 6(e)* ("Rule 6(e)") when it disclosed secret grand jury materials to private investigators from the Massachusetts Insurance Fraud Bureau ("the IFB"). In its motion to reconsider filed prior to the hearing, the government made two arguments: First, that I should have reviewed Judge Saris' earlier order allowing disclosure of grand jury materials for an abuse of discretion;[1] second, I should modify my February 20 decision because the government's violation was not "knowing" or in "bad faith" (in light of Judge Saris' order **[*25]** of disclosure), and therefore, dismissal of the indictment is unwarranted in any event.

During oral argument, the defense suggested that the government knew of the Rule 6(e) problems and the relevant case law, notably *United States v. Tager, 638 F.2d 167 (10th*

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[1] As I indicated from the bench, I reject the government's abuse of discretion analysis. The defendant's motion is not an appeal from Judge Saris' order entered in an ex parte proceeding. It is more akin to a motion for reconsideration of an earlier order by this Court which has been served on opposing counsel -- and subject to de novo consideration by this Court.

Cir. 1980), as early as 1994, but nevertheless continued to file ex parte motions for disclosure of grand jury materials to IFB personnel that were less than complete. The government responded that its ex parte filings were entirely appropriate since, after briefing, Judge Stearns came to the opposite conclusion on the question of the IFB's status under Rule 6(e) in a 1994 case, *United States v. Rosenthal* et al., No. 94-CR-10244-RGS. According to the government, Judge Stearns denied the defendants' motion to dismiss the indictment on Rule 6(e) grounds and expressly found IFB employees qualified as "government personnel" for purposes of Rule 6(e).

In light of these arguments, four questions are raised: (1) Whether the government violated Rule 6(e) when it disclosed secret grand jury materials to IFB investigators; (2) whether the Court must find the government violated Rule 6(e) "knowingly," or in the alternative, in "bad faith," before I may explore the question of the appropriate remedy through further discovery; (3) whether the government's violation was in fact "knowing" or in "bad faith"; and, (4) whether such a violation was harmless error.

I will accept further briefing on the second and third questions but not on the first or fourth for the reasons described below.

II. DISCUSSION

A. The Meaning of "Government Personnel"

As to the first question, I stand by my ruling on the definition of "government personnel" under Rule 6(e)(3)(A)(ii), as well as my finding that the government violated Rule 6(e) in this case despite the fact that it obtained an order authorizing disclosure to IFB personnel.[2] The government's recent concerns still do not address the fundamental question under Rule 6(e): What does the plain language of Rule 6(e)(3)(A)(ii) mean? The government's insistence that the better policy approach would be to have "government personnel" mean "privately employed personnel" or "private experts under contract with the government" should be addressed to Congress, not this Court. The **[*26]** latest arguments essentially ask me to read the phrase "government personnel" out of Rule 6(e)(3)(A)(ii), or mangle its plain meaning.

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[2] I note that the government's arguments at the reconsideration hearing generally either (a) ignored those portions of my February 20 decision which explicitly resolved certain questions of law and fact in the defendants' favor, or (b) raised issues for the first time in this case. As an example of (a), the government suggests that my February 20 decision missed the central question posed by the relevant case law on Rule 6(e) -- whether non-governmental recipients of secret grand jury materials acted under the "control and direction" of the federal government during a grand jury investigation. In fact, I identified this question, addressed the government's cases at length, and expressly ruled that the government had not met its burden of showing the requisite elements of "control and direction" with respect to the IFB to meet anything like a "government personnel" status. See Memorandum and Order, dated Feb. 20, 2001, at 17-24; see also *United States v. Sells Eng'g, Inc., 463 U.S. 418, 103 S. Ct. 3133, 77 L. Ed. 2d 743 (1983)* [hereinafter "Sells"]; *United States v. Benjamin, 852 F.2d 413 (9th Cir. 1988),* vacated on other grounds *Benjamin v. United States, 490 U.S. 1043, 104 L. Ed. 2d 418, 109 S. Ct. 1948 (1989); United States v. Anderson, 778 F.2d 602 (10th Cir. 1985)* [hereinafter "Anderson"]; *United States v. Lartey, 716 F.2d 955 (2d Cir. 1983)* [hereinafter "Lartey"]; *United States v. McRae, 580 F. Supp. 1560 (D.D.C. 1984)* [hereinafter "McRae"].

As an example of (b), the government at the hearing, which is to say, belatedly, asserted that the evidence showed the IFB investigators actually operated under the "control and direction" of the federal government during the Pimental investigation. The government maintains, without record support, that it provided IFB investigators with a memorandum at the time of grand jury disclosures that detailed the IFB's responsibilities under Rule 6(e). The government should have raised the claim, and presented some evidence to support it, at any one of the following opportunities: (1) Government's Motion for Reconsideration at 2-9 [docket # 55]; (2) Government's Opposition to Defendant's Motion for Reconsideration at 6-9 [docket # 52]; (3) Government's Opposition to Defendants' Motion to Dismiss at 3-9 [docket # 42] (4) Government's Opposition to Defendants' Motion for Discovery at 2 [docket # 37]; or (5) the September 7, 2000 hearing on defendant's motion to dismiss the indictment.

I disagree with the government's renewed efforts to parse the facts and holdings of *Sells*, *Tager*, *Anderson*, *Lartey*, and *Benjamin*, all of which were discussed at length in my February 20 decision.[3] The factual distinctions between *Anderson* and *Lartey* on the one hand, and *Tager* and this case on the other, make all the difference for purposes of my ruling that the government violated Rule 6(e) in the instant case.

First, the fact that IFB investigators in this case were not paid for their services by the federal government, as were the experts in *Anderson* and *Lartey*, means the IFB personnel were "not in any sense in the employ of the government" as were the experts in *Anderson* and *Lartey*. *Anderson, 778 F.2d at 605 n.1; Lartey, 716 F.2d at 964.* Indeed, it can be argued that the salaries of IFB investigators come from the victims of the economic crimes at issue, namely, the insurance companies.

In any event, this de facto "control" issue is more appropriate for consideration as "harmless error." See Part II.D infra.

[3] The government has never mentioned *United States v. Rosenfield, 780 F.2d 10 (3d Cir. 1985)*, where federal prosecutors took the more sensible position of conceding that private insurance investigators do not qualify as "government personnel" in circumstances similar to the instant case.

Second, the retained experts in *Anderson* and *Lartey* received pre-existing materials that were presented to the grand jury, not materials that were "cloaked with secrecy." *Anderson, 778 F.2d at 605* (comparing the facts of that case to the facts of Lartey); see also *Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, 235 (1st Cir. 1994).* The government made no claim here that the Pimental disclosures did not involve secret grand jury materials.

B. Whether the Violation Must Be "Knowing" or in "Bad Faith" Before a Remedy May Be Imposed

Assuming that a Rule 6(e) violation occurred, the government maintains that the Court must find the government's violation was "knowing" or in "bad faith" before it may order discovery or impose any remedy. Defendants urge that the "knowing" inquiry is only necessary before a violation of Rule 6(e) may be punished as a contempt of court. Cf. *Fed. R. Crim. P. 6(e)(2)*. If so, the Court may proceed directly to the question of harmless error and order the Rule 6(e) discovery per my February 20 decision.

The defendants are hereby **ORDERED** to submit supplemental briefs on whether the government's violation must be "knowing" or in "bad faith" by **April 20, 2001**. The government's response is due no later than **May 4, 2001**.

C. Whether the Government's Violation Was "Knowing"

Finally, assuming a "knowing" or "bad faith" finding is a prerequisite to remedying a Rule 6(e) violation, it remains to be determined whether the government violated Rule 6(e) "knowingly" or in "bad faith" in this case. The government believes the earlier orders issued by Judge Stearns in the

Rosenthal case, and by Judge Saris on the ex parte motion in this case, conclusively demonstrate that the government did not act in bad faith. The defendants have argued that the government acted knowingly in violating Rule 6(e), as evidenced by, inter alia, the failure to cite *Tager* in its ex parte motion, and possibly, the U.S. Attorney's internal policies and memoranda.[4]

The defendants are **ORDERED** to submit supplemental briefs on whether the government knowingly violated Rule 6(e) in the Pimental investigation by **April 20, 2001**. The government's response is due no later than **May 4, 2001**. The parties should reference **[*27]** evidence supporting their respective positions.

D. Harmless Error and Remedy

Only after the above questions are answered and all appropriate discovery is provided by the government may the Court address the issue of whether the government's Rule 6(e) violation prejudiced the Pimentals, and finally, the appropriate remedy. The cases the government cites (i.e., Sells, Anderson, Lartey, etc.) describe certain factors, like the nature of the grand jury disclosures, the persons to whom disclosures were made, and whether those persons were in the "employ" of the government in any sense, which may delineate the harmless error analysis to be applied. The government's alleged control over IFB employees, which was not disclosed prior to the reconsideration hearing, would also be relevant to the harmless error determination.

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[4] If the Pimentals believe internal policies or documents are necessary to the resolution of the "knowing" issue, they should submit a written motion for discovery of the government's files contemporaneously with their supplemental briefings. Of course, any such motion raises important concerns about the confidentiality of investigative documents. Defendants must show cause to believe such discovery will produce evidence of a knowing violation and present the reasons why such internal documents would not be privileged.

III. CONCLUSION

For the reasons stated above, the Court **STAYS** its February 20 Order compelling the government to produce Rule 6(e) discovery. The parties are **ORDERED** to submit supplemental briefs on the following two issues: (1) Whether the Court must find the government violated Rule 6(e) "knowingly," or in the alternative, in "bad faith," before I may explore the question of the appropriate remedy through further discovery; and (2) whether the government's violation in the Pimental investigation was in fact "knowing" or in "bad faith." Defendants' briefs are due no later than **April 20, 2001**. The government's response is due no later than **May 4, 2001**.

SO ORDERED.

Dated: April 11, 2001

NANCY GERTNER, U.S.D.J.

APPENDIX E

DISTRICT COURT'S OPINION RULING THAT THE GOVERNMENT VIOLATED RULE 6(E)

UNITED STATES OF AMERICA, v. ARTHUR L. PIMENTAL and LORETTA R. PIMENTAL, Defendants.

Criminal No. 99-10310-NG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

199 F.R.D. 28; 2001 U.S. Dist. LEXIS 2343

February 20, 2001, Decided

JUDGES: NANCY GERTNER, U.S.D.J.

OPINIONBY: NANCY GERTNER

OPINION: **[*29]**

MEMORANDUM AND ORDER RE: RECONSIDERATION OF DISCOVERY RULINGS

February 20, 2001

Defendants Arthur L. Pimental and Loretta R. Pimental ("the Pimentals") are charged with one count of conspiracy, in violation of *18 U.S.C. § 371,* and fourteen counts of mail fraud, in violation of *18 U.S.C. § 1341.* The Pimentals have moved for dismissal of the indictment on various grounds. I held a hearing on the motion to dismiss on September 7, 2000. At the conclusion of the hearing, I took the motion under advisement pending the resolution of the Pimentals' related motion for discovery, which was then still pending before the Magistrate Court.

On September 25, 2000, the Magistrate Court denied all but one of the Pimentals' requests for discovery. They now move for reconsideration of portions of the Magistrate Court's rulings on discovery. Their numerous discovery requests seek information defendants believe will support their motion to dismiss.

For the reasons stated below, the Pimentals' motion [docket # 49] is **GRANTED** as to their Rule 6(e) request (i.e., discovery request number one), but **DENIED** as to their remaining requests. The government is **ORDERED** to produce the Rule 6(e) discovery by **March 16, 2001**. If necessary, the Pimentals shall file supplementary briefs in support of their motion to dismiss no later than **April 6, 2001**. The government has until **April 20, 2001** to file a reply brief.

I. BACKGROUND

A. The Defendants

The Pimentals are a husband and wife team who own a steel business. The government alleges that the Pimentals made false statements to their insurers about the type of work their employees performed in the steel business. For example, the government contends that the Pimentals falsely informed insurers that the Pimentals' employees erected concrete structures when, in fact, the employees erected steel structures. The government also claims the Pimentals under-reported employee salaries. Through means of these misrepresentations, the government alleges, the Pimentals reduced their workers' compensation premiums, thereby defrauding insurers of hundreds of thousands of dollars.

B. The Investigation

On September 29, 1999, a federal grand jury indicted the Pimentals on one count of conspiracy, in violation of *18 U.S.C. § 371,* and fourteen counts of mail fraud, in violation of *18 U.S.C. § 1341.* The investigation leading up to the indictment, the government admits, was carried out jointly by the Federal Bureau of Investigation ("FBI") and the Insurance Fraud Bureau of Massachusetts ("IFB"). Indeed, the government acknowledges that the IFB performed the preliminary investigation into this matter and ultimately referred the case to the United States Attorney's Office ("USAO") for prosecution.

1. The Insurance Fraud Bureau

By way of emergency legislation in December 1996, the Massachusetts legislature authorized two private voluntary associations of Massachusetts insurance carriers, the Automobile Insurance Bureau of Massachusetts ("AIB") and the Workers' Compensation Rating and Inspection Bureau ("WCRIB") of Massachusetts,[1] to create an insurance fraud bureau "for the prevention and investigation of fraudulent insurance transactions." Mass. St. 1996, ch. 427, § 13. The AIB and WCRIB, in turn, created the IFB pursuant to that authorization. *Commonwealth v. Ellis, 429 Mass. 362, 708 N.E.2d 644, 646 (Mass. 1999)* [hereinafter "Ellis"].

The IFB is governed by a board of fifteen members, five from the governing committee of each rating bureau and five public officials.[2] Mass. St. 1996, ch. 427, § 13(a). The AIB and the WCRIB provide all of IFB's funding, which is borne equally by the two private insurance bureaus. Mass. St. 1996, ch. 427, § 13(c). The legislation authorizes IFB personnel to gain access to various information and records, if relevant to an IFB investigation and if used solely for IFB purposes, such as Department of Revenue records and certain criminal offender record information. Mass. St. 1996, ch. 427, § 13(d).

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[1] The AIB is licensed under Massachusetts General Laws chapter 175A, section 8. The WCRIB is licensed under Massachusetts General Laws chapter 152, section 52C.

Every insurer "having reason to believe than an insurance transaction may be fraudulent" must advise the IFB of the matter. Mass. St. 1996, ch. 427, § 13(e). "Whenever IFB's executive director is satisfied that a material fraud, deceit, or intentional misrepresentation has been committed in an insurance transaction," the executive director "shall refer the matter to the attorney general, the appropriate district attorney or the United States attorney" for prosecution. Mass. St. 1996, ch. 427, § 13(h).

2. IFB's Involvement in Grand Jury Proceedings

During the Pimental investigation, the USAO filed an ex parte motion on the District Court's Miscellaneous Business Docket ("MBD"). The motion sought the District Court's leave to disclose grand jury materials "to outside experts assisting" the Pimental investigation, namely, IFB investigators and data analysts. The request was made pursuant to *Federal Rule of Criminal Procedure 6(e)(3)(A)(ii)* ("Rule 6(e)"), which authorizes disclosure to "such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." The government disclosed to the District Court that IFB "is a state-chartered, privately funded, investigative entity, established by the Automobile Insurance Bureau of Massachusetts and the Workers' Compensation Bureau of Massachusetts pursuant to a grant of authority from the Massachusetts Legislature." Judge Saris summarily granted the government's motion, signing a form order proposed by the government.

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[2] The public officials are: (1) The Secretary of the Executive Office of Public Safety; (2) the Director of Labor and Workforce Development; (3) the Registrar of Motor Vehicles; (4) the Commissioner of Insurance; and (5) the Commissioner of the Department of Industrial Accidents.

Consequently, IFB employees had some (as yet undetermined) access to grand jury materials and influence on the grand jury. For instance, IFB investigators helped the USAO present the case to the grand jury. Scott S. Faragi ("Faragi"), a criminal investigator employed by IFB, was one of the four witnesses who appeared before the grand jury. In fact, Faragi's testimony comprised the bulk of the testimony heard by the grand jury.[3] Prior to convening the grand jury, Faragi had interviewed each of the other three witnesses who testified.

C. The Motion to Dismiss the Indictment

After learning of IFB's extensive involvement in the investigation and other facts, the Pimentals moved to dismiss the indictment against them. The motion to dismiss makes four arguments: (1) The government violated Rule 6(e) by disclosing secret grand jury materials to privately-funded, non-governmental investigators from the IFB; (2) IFB's role in the investigation and prosecution violates the Pimentals' right to a disinterested prosecutor; (3) IFB investigators violated Massachusetts law by misrepresenting themselves as state law enforcement officers to witnesses IFB interviewed; and (4) the federal prosecution violates the McCarran-Ferguson Act, *15 U.S.C. § 1012*(b), because the federal mail fraud statute provides harsher penalties than corresponding Massachusetts **[*31]** statutes prohibiting insurance fraud, thereby invalidating, impairing, or superseding a state law regulating the insurance industry.[4]

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[3] Faragi's testimony covers 126 pages of the 204-page grand jury transcript.

D. The Motion for Discovery

The Pimentals also sought various forms of discovery from the government to further develop their arguments for dismissal of the indictment. The Motion for Discovery contained eight requests. The Magistrate Court (Alexander, J.) denied all of the Pimentals' requests except number four, which relates to the provision of funding by IFB to the

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[4] In relevant part, the Pimentals argue:

> The McCarran-Ferguson Act, *15 U.S.C. § 1012*(b), provides, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . ." Here, [*Mass. Gen. Laws ch. 152, § 14*], prohibits various types of fraud relating to workers' compensation insurance but limits a sentence thereunder to five years. This limit plainly reflects the judgment of the Legislature as to the appropriate maximum penalty for such an offense, as well as its expectation as to the types of sentences that will actually be imposed (i.e., substantially lower). By contrast, the maximum penalty for each of the 15 felony counts in this indictment is five years, a prospect the government trumpeted in the press release announcing the Pimentals' indictment.

Defendants' Memorandum in Support of Their Motion to Dismiss at 10-11.

USAO.[5] The Pimentals now move this Court to reconsider only those portions of Judge Alexander's decision denying discovery requests. Each request will be summarized in turn as I address the merits of the Pimentals' claims.

II. DISCUSSION

After consideration of the record before me, I must conclude that the government, in fact, did violate Rule 6(e) by disclosing secret grand jury materials to IFB employees.[6] Thus, the Pimentals' motion to reconsider the Magistrate Court's ruling as to discovery request number one is **ALLOWED**. As to the Pimentals' remaining requests, I agree with the Magistrate Court's rulings. Discovery requests two, three, and five through eight are **DENIED**.

A. Rule 6(e) Violation (Discovery Request No. 1)

First, the Pimentals requested documents or information relating to the disclosure of Rule 6(e) grand jury material to any person affiliated with IFB, including: Any pleadings, letters, or court orders; identification of the materials disclosed; the date and time of disclosure; and the identities of the persons to whom materials were disclosed. I find that IFB investigators do not fall within the meaning of "government personnel" for purposes of Rule 6(e). It follows that the government violated Rule 6(e) by disclosing grand jury materials to IFB investigators and data analysts. Federal case law persuasively supports this view. Thus, I will **ALLOW** the Pimentals' motion for reconsideration as to discovery request number one.

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[5] I will discuss Judge Alexander's rulings with respect to each discovery request when I address the merits of the Pimentals' Motion for Reconsideration.

[6] To be sure, I do not find that the Rule 6 violation was "knowing," and therefore, punishable as contempt of court. See *Fed. R. Crim. P. 6(e)(2)*. Nor does my holding here imply that the Pimentals suffered prejudice as a result of the Rule 6(e) violation. Defendants still face a long road to dismissal of the indictment. See *Bank of Nova Scotia v. United States, 487 U.S. 250, 254, 101 L. Ed. 2d 228, 108 S. Ct. 2369 (1988)*.

1. The Parties' Arguments

According to the Pimentals, the IFB is not a state or local governmental agency, despite its roots in state legislation. If that is true, it follows that IFB investigators are private citizens who do not fall within the "government personnel" exception of Rule 6(e)(3)(A)(ii). Thus, the Pimentals argue that the government should not have disclosed grand jury materials to IFB personnel. More to the point, the government's ex parte motion for disclosure cited cases that do not stand for the proposition that experts who are not within the full-time employ of a government agency may nonetheless qualify as "government personnel."[7] The government, **[*32]** they charge, also failed to cite a Tenth Circuit case that directly undermines its motion for disclosure. See *United States v. Tager, 638 F.2d 167, 170-71 (10th Cir. 1980)* [hereinafter "*Tager*"].

The government responds that no Rule 6(e) violation occurred because IFB personnel qualify as "government personnel" under Rule 6(e)(3)(A)(ii). According to the government, the *Tager* case is no longer good law. In any event, the government filed its motion in good faith as the

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[7] As discussed below, each of the cases cited by the government in its ex parte application are easily distinguished from the instant case. See *United States v. Sells Eng'g, Inc., 463 U.S. 418, 436, 103 S. Ct. 3133, 77 L. Ed. 2d 743 (1983)* [hereinafter "Sells Engineering"]; *United States v. Lartey, 716 F.2d 955, 963 (2d Cir. 1983); United States v. McRae, 580 F. Supp. 1560, 1562 (D.D.C. 1984).*

Assistant U.S. Attorney was unaware of *Tager* at the time. Finally, assuming arguendo that the government violated Rule 6(e), the government argues that the District Court's order of disclosure absolves the government of its mistake.[8]

2. The Magistrate Court's Ruling on Disclosures

On the motion for discovery, the Magistrate Court correctly recognized that the disclosure of the grand jury materials by the government "raises important questions," and found the question of whether an actual Rule 6(e) violation occurred to be a close call. Most importantly, she noted, the Pimentals concede that the USAO secured an order from the District Court expressly granting the government leave to disclose materials to the IFB. The Magistrate Court found "it is not this Court's place, nor is it within this Court's authority, to second-guess the district court's decision granting disclosure." Beyond that, the Magistrate Court noted that "the defendants have not provided the court with sufficient information to do so despite having possession of the order permitting the disclosure, and the grand jury transcripts and other 'open file' discovery already provided to them by the government." Accordingly, Judge Alexander denied the Pimentals' request.

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[8] The government is not required to seek approval from the District Court before making disclosures under Rule 6(e)(3)(A)(ii), as the rule is designed to be self-executing. *Sells Eng'g, 463 U.S. at 426.* Judge Young aptly described the government's attempt to secure a court order authorizing (A)(ii) disclosures as "looking for a little 'cover' as it pursues its investigatory responsibilities in conjunction with [IFB] employees." *In re Grand Jury Proceedings, 2000 U.S. Dist. LEXIS 16245,* No. 00-10357, 2000 WL 1678078, at *2 (D. Mass. Nov. 1, 2000).

3. The Rule of Grand Jury Secrecy

We begin with bedrock criminal procedure. Grand jury proceedings have been closed to the public for centuries, and the rule of grand jury secrecy "is an integral part of our criminal justice system." *Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 n.9, 60 L. Ed. 2d 156, 99 S. Ct. 1667 (1979).* Although the justification for grand jury secrecy has evolved over time, the interests served by the rule are well established:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Id. at 219 n.10 (quoting *United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 n.6, 2 L. Ed. 2d 1077, 78 S. Ct. 983 (1958)).*

Rule 6(e) codifies the requirement that grand jury activities generally remain secret: "An attorney for the government . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. . . . A knowing violation of Rule 6 may be punished as a contempt of court." *Fed. R. Crim. P. 6(e)(2)*. The Supreme Court admonishes: "In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of this secrecy has been authorized." **[*33]** *Sells Eng'g, 463 U.S. 418, 425, 103 S. Ct. 3133, 77 L. Ed. 2d 743 (1983)*. The Rule recognizes limited exceptions to grand jury secrecy, including an exception for disclosures made to state or federal government personnel:

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to . . . such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.*Fed. R. Crim. P. 6(e)(3)(A)(ii)*. Consequently, Rule 6(e) provides that the government should refrain from disclosing grand jury materials to persons outside the control of the government, except as otherwise expressly provided by Rule 6(e)(3).

4. Do IFB Investigators Fall Within the Meaning of "Government Personnel" Under Rule 6(e)(3)(A)(ii)?

a. The IFB Is a Private Investigative Agency.

Undoubtedly, the IFB retains some cloak of official authority, however small, by virtue of its legislative authority. One-third of its board members are public officials. The authorization statute provides for IFB access to some public records that are otherwise unavailable to private investigative agencies. The statute also places some affirmative obligations, general in nature, on the IFB, the insurance bureaus, and insurance carriers for reporting suspected insurance fraud.

It does not follow, however, that the IFB is more appropriately characterized as a governmental agency. To the contrary, the IFB inhabits a region of the private/public spectrum that is much closer to a purely private agency. First, the IFB receives 100% of its budget from private insurance companies. All IFB employees, therefore, receive their salaries directly from the insurance associations (i.e., the AIB and the WCRIB). Second, neither the state of Massachusetts nor the federal government exercises administrative control over the IFB and its policies.[9] The state officials serving on the IFB board cannot exercise control over the IFB; they represent a select minority of board members. *Ellis, 708 N.E.2d at 647 n.6.* Instead, private interests govern the IFB's operations. Third, IFB investigators do not operate under the control and direction of the USAO or the Commonwealth. E.g., *Commonwealth v. Ellis, 1998 Mass. Super. LEXIS 421,* No. 97-192, 1998 WL 470551, at *5 n.22 (Mass. Super. Ct. July 31, 1998), aff'd, *429 Mass. 362, 708 N.E.2d 644 (Mass. 1999).*

Considering these characteristics of the IFB, the Massachusetts courts have not hesitated to dub the IFB a "private investigative agency." *In re Ellis, 425 Mass. 332, 680 N.E.2d 1154, 1160 (Mass. 1997);* Commonwealth v. Ellis, 1998 WL 470551, at *2. It is quite obvious that the Supreme Judicial Court never doubted IFB's status as a private, non-governmental agency in Ellis. A close reading of Ellis discloses that the court presumed the private nature of the IFB throughout its opinion. E.g., *Ellis, 708 N.E.2d at 653* ("The reimbursement by IFB of an assistant attorney general for his purchase of a computer hard drive and of IFB's other financial assistance to the division directly related to these indictments are more problematic . . . .").

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[9] This is especially true with respect to the federal government, which enjoys no representation on the IFB board or among IFB management.

Despite the Supreme Judicial Court's professed view of the IFB as a "private investigative agency," the First Circuit, in passing, has referred to the IFB as "a quasi-governmental entity." *In re Justices of the Superior Court, 218 F.3d 11, 13 (1st Cir. 2000).* The First Circuit's remark has created some confusion as to status of the IFB. E.g., *In re Grand Jury Proceedings, 2000 U.S. Dist. LEXIS 16245,* No. 00-10357, 2000 WL 1678078, at *2 (D. Mass. Nov. 1, 2000).[10] **[*34]** Until now, the government has escaped thorough judicial oversight of its conduct because of the ex parte nature of grand jury proceedings. Not surprisingly, this District Court's conclusions have been inconsistent, at best.

I have little trouble agreeing with the Supreme Judicial Court that the IFB should be treated as a private agency employing private investigators, rather than as a government agency employing government personnel. It necessarily follows that I find IFB employees are not appropriate recipients of grand jury materials under Rule 6(e)(3)(A)(ii).

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[10] For example, in reviewing a government motion seeking leave to disclose grand jury materials to the IFB under Rule 6(e)(3)(A)(ii), one member of this Court stated: "It is unclear whether, in fact, the Bureau and its executive directors and employees are 'government personnel' as defined in Rule 6(e)(3)(A)(ii)." In re Grand Jury Proceedings, 2000 WL 1678078, at *2 (Young, C.J.). There, the court found it did not have occasion to resolve the Rule 6(e) issue as "there is presently no case or controversy before it and any potential dispute concerning disclosure to [IFB] employees is not now ripe for adjudication." Id.

I do not believe the First Circuit's characterization of the IFB as "a quasi-governmental agency" affects my Rule 6(e) analysis for several reasons. First, the text of Rule 6(e)(3)(A)(ii) says nothing about "quasi-governmental" personnel. If the drafters of (A)(ii) intended to include non-governmental or quasi-governmental experts within the (A)(ii) exception, presumably the drafters would have used different language to evidence their intent. Thus, were I to find IFB investigators are "quasi-governmental" personnel, they still fall outside the plain meaning of "government personnel."

Second, even if the text of Rule 6(e)(3)(A)(ii) were ambiguous, which it is not, the legislative history of the "government personnel" exception makes clear that IFB investigators do not qualify as "government personnel." See "Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings on H.R. 5864 Before the House Subcomm. on Criminal Justice of the House Comm. on the Judiciary," 95th Cong. 92 (1977) (statement of Wayne LaFave, Reporter, Advisory Comm. on Criminal Rules) [hereinafter "Hearings on H.R. 5864"]; S. Rep. No. 95-354, at 6-7 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 530. The drafters of (A)(ii) actually considered whether the assistance of private, non-governmental experts should be included. Professor Wayne LaFave, speaking on behalf of the drafters, reported the drafters' decision:

> [Rep. James Mann:] Along the same line, the rule seems to restrict to other Government personnel the experts -- and I will use that term loosely -- that the attorney for the Government may call upon.
>
> We have a pretty big Government with a lot of experts, but on certain matters there may not

> be a governmental employee who is expert in that field.
>
> Is it your intention not to permit the prosecutor to call in an astrologer or astronomer, for example?
>
> Professor LaFave: Yes; that is correct.
>
> Apparently representatives of the Justice department whom we talked to about this particular problem did not seem to think that was a problem, in other words, that there was an occasion when they would need an expert and couldn't find the astrologer some place in the Federal Government.

Hearings on H.R. 5864 at 92. Throughout the legislative history, there is no hint or suggestion that (A)(ii) should be read broadly to include private persons. To the contrary, the history compels my conclusion that the Judicial Conference drafters and Congress intended (A)(ii) to include only personnel employed by governmental departments and administrative agencies.[11]

Third, by broadening the meaning of "government personnel" to include non-governmental experts who remain outside the control and direction of the government, the government vitiates the "rule" of grand jury secrecy. As noted above, Rule 6(e)'s secrecy requirement serves several purposes, including to prevent harm to the reputation of those targeted by the investigation and to protect the grand jury from outside influence. *Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219, 60 L. Ed. 2d 156, 99 S. Ct. 1667 (1979).* Disclosure, on the other hand, increases the number of persons to **[*35]** whom "secret" information is available, thereby increasing the risk of inadvertent or illegal release to third parties. *Sells Eng'g, 463 U.S. 418, 432, 103 S. Ct. 3133, 77 L. Ed. 2d 743 (1983).* Thus, the government may thwart Rule 6(e)'s effectiveness if it discloses grand jury materials to non-governmental personnel, such as IFB investigators, who do not operate under the control and direction of the federal government or the Commonwealth.

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[11] The examples most often cited by legislators and other participants in the subcommittee hearings are experts employed by the IRS, the SEC, the Treasury Department, and the U.S. Postal Service. E.g., Hearings on H.R. 5864 at 30-31, 35, 86-87.

b. Case Law Interpreting Rule 6(e)(3)(A)(ii)

Federal case law persuasively supports my view that the government violated Rule 6(e) in the instant case. E.g., *Tager, 638 F.2d 167, 170 (10th Cir. 1980); United States v. Rosenfield, 780 F.2d 10, 11-12 (3d Cir. 1985); In re November 1992 Special Grand Jury, 836 F. Supp. 615, 617 (N.D. Ind. 1993).* Courts reviewing disclosures to persons who are not technically "government personnel" have consistently focused on whether the recipient remained under the control and direction of the government during the relevant time period. See *United States v. Anderson, 778 F.2d 602, 605 (10th Cir. 1985); United States v. Lartey, 716 F.2d 955, 964 (2d Cir. 1983); United States v. Thomas, 593 F.2d 615, 623 (5th Cir. 1979); United States v. McRae, 580 F. Supp. 1560, 1563 (D.D.C. 1984).* Here, IFB investigators were never under the control and direction of the USAO so as to meet the narrow "government personnel" exception.

For example, in *Tager*, the Tenth Circuit reversed the defendant's conviction for mail fraud after finding the government violated Rule 6(e)(3)(A)(ii) under circumstances materially indistinguishable from those here. See *638 F.2d 167, 170-71 (10th Cir. 1980).* In that case, the investigation leading to the indictment at issue was initiated by an investigator employed by the Insurance Crime Prevention Institute ("ICPI"). *Id. at 168.* The ICPI was an organization funded by over 300 insurance companies to investigate possible frauds against insurance companies. Similar to the IFB in this case, neither the ICPI nor the investigator were in "any official position whatever." *Id.* The ICPI investigator referred the case to the U.S. Postal Inspection Service for prosecution, and then he continued to assist in the investigation at the government's invitation. When a grand jury was convened, the government moved for disclosure of certain grand jury materials to enable him further to assist in the investigation pursuant to Rule 6(e)(3)(C)(i), which provides for disclosure by court order preliminarily to or in connection with a judicial proceeding. Id. A trial judge who heard the motion granted it and ordered the requested disclosure.

After an indictment was returned against the defendant and others, *Tager* moved to dismiss the indictment on Rule 6(e) grounds. *Tager, 638 F.2d at 168.* The district court expressed misgivings as to whether the disclosure to the ICPI investigator was authorized by Rule 6(e), but found that it was bound by the prior decision of the trial judge who originally authorized the disclosures. Id.

On appeal, the Tenth Circuit concluded that the disclosure to the ICPI investigator was not authorized by Rule 6(e). *Id. at 171.* Since the ICPI investigator was "neither a government attorney, government 'personnel,' nor a criminal defendant, subsections (A)(i), (A)(ii), and (C)(ii) are not applicable." Id. The court explicitly found "the drafters of (A)(ii) considered whether the assistance of private persons like Mr. House [the ICPI investigator] should be included. The drafters decided against such inclusion by limiting (A)(ii) to "government personnel." *Id. at 170* (citing Hearings on H.R. 5864 at 92); accord *United States v. Rosenfield, 780 F.2d 10, 11 (3d Cir. 1985)* (government conceded that ICPI investigator did not fall within the Rule 6(e)(3)(A)(ii) exception). After rejecting the government's Rule 6(e)(3)(C)(i) argument, the Tenth Circuit concluded the district court was "without authority" to order disclosure to the ICPI investigator to assist the ongoing grand jury investigation. *Tager, 638 F.2d at 171.*

I find the Tenth Circuit's reasoning persuasive; it squarely addresses the four corners of the Rule 6(e) question in this case. Indeed, the government has not cited a single **[*36]** case that repudiates *Tager*'s holding on Rule 6(e)(3)(A)(ii).[12]

The government argues *Tager* has been undermined by the Tenth Circuit in *United States v. Anderson, 778 F.2d 602, 605 (10th Cir. 1985).*[13] That is not so. In Anderson,

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[12] Though the First Circuit has not adopted the *Tager* holding, I am not aware of any First Circuit case that undermines the *Tager* reasoning.

[13] In its Opposition to Defendants' Motion to Dismiss, the government also relies on *United States v. Benjamin, 852 F.2d 413 (9th Cir. 1988)* [hereinafter "Benjamin"], to argue that the reasoning of *Tager* has been subsequently undermined. As an initial matter, I note that the Supreme Court vacated Benjamin, so that case does not remain good law. *Benjamin v. United States, 490 U.S. 1043, 104 L. Ed. 2d 418, 109 S. Ct. 1948 (1989).* Also, even if the Benjamin decision were good law, its holding is not on-point. There, the Ninth Circuit upheld disclosures to a non-governmental expert under Rule 6(e)(3)(C)(i) -- not under Rule 6(e)(3)(A)(ii) -- where disclosure is ordered by a court on "a strong showing of particularized need." *Benjamin, 852 F.2d at 419.* The Ninth Circuit's reasoning does not support the government's view that private investigators fall within the "government personnel" exception of Rule 6(e)(3)(A)(ii).

Moreover, the government did not move for disclosure on Rule 6(e)(3)(C)(i) grounds, nor does it defend its actions on (C)(i) grounds in its opposition to the motion to dismiss. It never made a "strong showing of particularized need" in the first instance. In any event, on the government retained a professor to testify before the grand jury as an "expert witness" on trust law.[14] The witness was "under contract with the government" at the time of disclosure. Id. The Tenth Circuit found the facts of Anderson to be similar to the Second Circuit's Lartey decision (discussed below), and reversed the district court's order dismissing the indictment.

In reaching that conclusion, the Tenth Circuit explicitly found "the facts in *Tager* are far different from the present facts." *Anderson, 778 F.2d at 605.* "In *Tager* the disclosure involved grand jury transcripts, not preexisting promotional materials. The person to whom disclosure was made was a nontestifying investigator and was not in any sense in the employ of the government, and the prosecution, not the grand jury, made the request for disclosure." *Id. at 605 n.1.* The Pimentals' case, unlike Anderson, involves a prosecutor-initiated disclosure of grand jury materials to both testifying and non-testifying private investigators and data analysts, none of whom were in the employ of the state or federal government.

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this record, the government is not likely to succeed even if it argued the point on Rule 6(e)(3)(C)(i) grounds. See *In re November 1992 Special Grand Jury, 836 F. Supp. 615, 618 (N.D. Ind. 1993).*

[14] The grand jury requested some materials, which were promulgated to the general public by defendants. Some of the materials were shown to the retained expert witness, and he testified before the grand jury concerning them. Thus, in Anderson, Rule 6(e) might not have applied at all because the disclosed materials constituted "business records or similar documents 'created for purposes independent of grand jury investigations, which have legitimate uses unrelated to the substance of the grand jury proceedings.'" *Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, 235 (1st Cir. 1994)* (quoting *United States v. Dynavac, Inc., 6 F.3d 1407, 1412 (9th Cir. 1993)).*

The government relies on other cases that are, like Anderson, materially different than the Pimentals' case.[15] For example, the government cites dicta in *Sells Engineering* for the following proposition: "Rule 6(e)'s 'government personnel' exception was adopted to meet Justice Department attorneys' need for 'active assistance from outside personnel -- not only investigators from the FBI, IRS, and other law enforcement agencies, but also accountants, handwriting experts, and other persons with special skills.'" Government's Motion for Leave at 4 (quoting *Sells Eng'g, 463 U.S. at 436).* Read in context, however, the quoted passage plainly does not imply that Rule 6(e)(3)(A)(ii) includes non-governmental personnel within its exception for "government personnel." Rather, the Supreme Court noted only that Justice Department attorneys often require expert assistance from government personnel employed by government agencies other than **[*37]** the Justice Department.[16] *Id. at 436.*

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[15] The government's motion cited three cases for the proposition, "as insurance fraud experts deemed necessary by the undersigned attorney for the government to assist in the federal investigation, [IFB] investigators are 'government personnel' within the meaning of Rule 6(e)(3)(A)(ii)." See *Sells Eng'g, 463 U.S. 418, 103 S. Ct. 3133, 77 L. Ed. 2d 743 (1983); United States v. Lartey, 716 F.2d 955 (2d Cir. 1983); United States v. McRae, 580 F. Supp. 1560 (D.D.C. 1984).*

[16] Indeed, the Supreme Court did not decide Sells Engineering on Rule 6(e)(3)(A)(ii) grounds. In that case, the government had moved for disclosure of grand jury materials to attorneys in the Justice Department's Civil Division, their paralegal and secretarial assistants, and certain Defense Department experts, for use in preparing a civil suit against targets of a criminal fraud and tax evasion investigation. *Sells Eng'g, 463 U.S. at 421.* The Supreme Court found such access to grand jury materials permissible only when the government moves for court-ordered disclosure under Rule 6(e)(3)(C)(i) and makes a showing of particularized need as required by that Rule. *Id. at 420.* The case is largely irrelevant for our present purposes.

The government also points to *United States v. Lartey, 716 F.2d 955 (2d Cir. 1983).* There, the Second Circuit upheld disclosure to a former IRS investigator who was retained by the USAO to assist a grand jury investigation. *Id. at 963.* The retained expert in *Lartey*, unlike the IFB investigators here, "was employed exclusively by the government" during the period he had access to grand jury materials. Id. The Second Circuit concluded that the expert, "who worked exclusively for the government during the *Lartey* investigation and trial, providing it with expertise not possessed by permanent employees of the United States, fell within the 'government personnel' exception to Rule 6(e)." *Id. at 964.* In contrast to *Lartey*, the government does not claim the IFB investigators were temporarily employed by the government, or otherwise under its control.

Finally, the government cites *United States v. McRae, 580 F. Supp. 1560 (D.D.C. 1984).* In McRae, the district court upheld the USAO's disclosure of grand jury materials to a District of Columbia police detective. *Id. at 1562.* At the time of *McRae*, Rule 6(e)(3)(A)(ii) did not expressly authorize disclosures to governmental personnel "of a state or subdivision of a state." The district court held that, even if state police officers did not fall within the meaning of "government personnel," a D.C. police officer qualified as "government personnel" because of the unique relationship between the federal government and the District of Columbia. In short, the court found that members of the D.C. Police Department were government personnel under Rule 6(e)(3)(A)(ii) because they act "under the control and direction of the United States Attorney." *Id. at 1563.* By contrast, Faragi and the other IFB investigators do not act under the control and direction of the USAO or any other governmental agency. *McRae*, like all of the cases cited by the government, does not support the government's theory that non-governmental personnel, employed by the IFB, fall within the "government personnel" exception to the rule of grand jury secrecy.

5. Discovery Remedy for the Rule 6(e) Violation

I find the Pimentals are entitled to discovery to determine the scope and possible impact of the Rule 6(e) violations. The government has not raised any potential damage that may arise if the Pimentals acquire the requested information. Accordingly, the Pimentals' first discovery request is **ALLOWED**. The government shall produce the requested information by **March 16, 2001.**

B. Impersonation of Police Officers (Discovery Request Nos. 2-3)

Discovery requests two and three seek information supporting the Pimentals' claim that IFB investigators misrepresented themselves to witnesses in violation of Massachusetts law prohibiting impersonation of law enforcement officers. Thus, the Pimentals moved for all IFB policies, guidelines, and procedures for interviewing witnesses, as well as all IFB policies, guidelines, and procedures for requesting documents from witnesses.

The Magistrate Court denied the Pimentals' second and third requests because the Pimentals already possess sufficient evidence from which to develop this claim (i.e., a list of all the witnesses interviewed), yet they assert no evidence of an actual violation of the Commonwealth's laws. I wholeheartedly agree with the Magistrate Court. Assuming arguendo that the IFB investigators violated the Commonwealth's laws, the Pimentals assert no legal authority supporting their claim **[*38]** that the indictment should be dismissed. Discovery requests two and three were properly **DENIED.**

C. Indictment Foreclosed by the McCarran-Ferguson Act (Discovery Request Nos. 5-6, 8)

Discovery requests five, six, and eight apply both to the disinterested prosecutor and McCarran-Ferguson Act claims.[17] The Pimentals requested: (5) All documents reflecting policies for determining whether to refer a matter for prosecution, and, in the event of referral, which of the prosecuting authorities a matter should be referred to; (6) all documents or information reflecting the USAO's policies for accepting or rejecting IFB criminal referrals; and (8) all documents relating to IFB policies, guidelines, or procedures for assisting in the implementation of a civil remedy provided by Massachusetts General Laws chapter 152, section 25(c)(9).

The Magistrate Court correctly denied discovery requests based on the Pimentals' McCarran-Ferguson Act claim. Their argument is futile. Federal courts have unanimously held that federal mail fraud prosecutions are not barred by the McCarran-Ferguson Act. E.g., *United States v. Blumeyer, 114 F.3d 758, 768 (8th Cir. 1997); United States v. Cavin, 39 F.3d 1299, 1305 (5th Cir. 1994); United States v. Sylvanus, 192 F.2d 96, 100 (7th Cir. 1951).* Also, the Magistrate Court correctly noted that the Supreme Court's decision in *Humana Inc. v. Forsyth, 525 U.S. 299, 306-11, 142 L. Ed. 2d 753, 119 S. Ct. 710 (1999),* confirms the reasoning of those circuit decisions cited above. On the basis of the McCarran-Ferguson Act claim, the motion for reconsideration is **DENIED** as to discovery requests five, six, and eight.

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[17] Although defendants argued for request numbers five, six, and eight in connection with their McCarran-Ferguson argument for dismissal, the Magistrate Court found some of these requests more relevant to defendants' disinterested prosecutor claim. I agree with the Magistrate Court on this score and will address these claims accordingly.

D. Disinterested Prosecutor (Discovery Request Nos. 5-8)

Discovery requests five through eight are relevant to the Pimentals' disinterested prosecution claim.[18] In addition to the information requested in connection with the McCarran-Ferguson Act claim, which I have already addressed, the Pimentals' seventh request seeks all documents or information reflecting whether any alleged victim in this case contributed, directly or indirectly, to funding or other support for IFB. The Magistrate Court denied all of these requests, with the caveat that defendants could make such additional requests in the future if the court-ordered discovery produced evidence of a financial link between the USAO and the IFB or a private company.

Given my findings above, I will presume that the IFB is not disinterested. But more to the point, the IFB is not a "prosecutor" at all. Defendants point to no evidence whatsoever that the IFB or a private insurance company made any decision on behalf of the prosecution in this case. Also, the relationship between the USAO and the IFB exhibits none of the intimacy that exists between the IFB and the Commonwealth's Office of the Attorney General. See *Ellis, 429 Mass. 362, 708 N.E.2d 644, 652-54 (Mass. 1999).* Thus, the discovery requested in numbers five through eight is irrelevant to determining whether the USAO remains a disinterested prosecutor in this case. The Pimentals' motion for reconsideration as to these requests is **DENIED.**

III. CONCLUSION

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[18] Request number four also concerned the Pimentals' disinterested prosecutor argument. To this end, they demanded all documents or information relating to any provision of funding, assistance, or any other thing of value by IFB to the USAO or FBI or any other federal agency in connection with the investigation or prosecution.

For the reasons stated above, the Pimentals' motion for reconsideration of the Magistrate Court's ruling on discovery is **GRANTED** as to discovery request number one and **DENIED** as to all other requests. I **ORDER** the government to produce the Rule 6(e) discovery by **March 16, 2001**. The Pimentals **[*39]** shall file any necessary supplementary briefs in support of their motion to dismiss no later than **April 6, 2001**. The government has until **April 10, 2001** to file a supplementary reply brief.

SO ORDERED.

Dated: February 20, 2001

NANCY GERTNER, U.S.D.J.

APPENDIX F

COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING

United States Court of Appeals
For the First Circuit

Nos. 03-1098
03-1153

UNITED STATES,
Appellant/Cross Appellee,

v.

ARTHUR L. PIMENTAL, Defendant-Appellee/Cross Appellant

Before

Boudin, Chief Judge,
Torruella and Selya, Circuit Judges,
Lynch, Lipez and Howard Circuit Judges,
Rosenn*, Senior Circuit Judge.

ORDER OF COURT

Entered: October 15, 2004

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:

RICHARD CUSHING DONOVAN,
Clerk

MARGARET CARTER
By:..
Chief Deputy Clerk

[cc: Harvey Peters, Esq., James C. Rehnquist, Esq., Miriam Kim, Esq., Mark J. Balthazard, AUSA, Dina M. Chaitowitz, AUSA]

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*Judge Rosenn, of the Third Circuit and sitting by designation, did not participate in the consideration of the en banc petition.

APPENDIX G

Federal Rule of Criminal Procedure 6(e)(3)(A)(ii)

Disclosure of a grand-jury matter – other than the grand jury's deliberations or any grand juror's vote – may be made to . . . any government personnel – including those of a state or a state subdivision or of an Indian tribe – that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law. . .

APPENDIX H

18 U.S.C. § 1341

Frauds and Swindles (mail fraud statute)

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service . . . [shall be guilty of a felony].

APPENDIX I

1996 Mass. Acts 427, § 13 (creating the Massachusetts Insurance Fraud Bureau)

"An act relative to the disability retirement law",

Notwithstanding the provisions of any general or special law to the contrary, the Automobile Insurance Bureau of Massachusetts, or its successor licensed under the provisions of section eight of chapter one hundred and seventy-five A of the General Laws, and the Workers' Compensation Rating and Inspection Bureau of Massachusetts or its successor licensed under the provisions of section fifty-two C of chapter one hundred and fifty-two of the General Laws are hereby authorized to create an insurance fraud bureau with the powers and duties specified in this section for the prevention and investigation of fraudulent insurance transactions.

[No change through paragraph (b).].

(a) Said insurance fraud bureau shall be governed by a board consisting of fifteen members, one of whom shall be the secretary of the executive office of public safety, one of whom shall be the director of labor and workforce development, one of whom shall be the registrar of motor vehicles, one of whom shall be the commissioner of insurance, and one of whom shall be the commissioner of the department of industrial accidents, and five of whom shall be members of the governing committee of the Automobile Insurers Bureau of Massachusetts, or its successor, and five of whom shall be members of the governing committee of the Workers' Compensation Rating and Inspection Bureau of Massachusetts or its successor.

(b) The governing board of said insurance fraud bureau shall employ an executive director and a general counsel. The executive director shall be responsible for the administrative operation of said insurance fraud bureau and shall perform such other tasks as said board may direct. The executive director shall ensure that appropriate resources of the insurance fraud bureau are dedicated to the investigation of fraudulent workers' compensation insurance transactions as well as other fraudulent insurance transactions. The general counsel shall be the chief legal officer of said insurance fraud bureau.

(c) The executive director shall appoint other employees of the insurance fraud bureau as necessary. The executive director may expend for legal, investigative, clerical and any other expenses in sums as are necessary. The executive director shall also disseminate the provisions of this act by publishing informational brochures and other materials which encourage the public to report workers' compensation fraud and shall maintain a toll free number to receive the reports. All costs of administration and operation of the insurance fraud bureau shall be paid as follows: one-half by the members of the Automobile Insurers Bureau, or its successor rating organization licensed under *section 8 of chapter 175A of the General Laws* and the companies authorized to write private or commercial automobile insurance that are not members of the licensed rating organization, apportioned on the basis of the direct written premium of each company in the most recent calendar year; and one-half by the members of the Workers' Compensation Rating and Inspection Bureau, or its successor organization licensed under *section 52C of chapter 152 of the General Laws*, and the companies authorized to write workers' compensation insurance that are not members of the licensed rating organization, apportioned on the basis of the direct written premium of each company in the most recent calendar year. The executive director shall determine the estimated costs for the operation of the insurance fraud bureau and upon approval by the bureau shall assess the licensed rating organizations and the other nonmember companies in accordance with this section. The estimated costs shall be paid to the executive director and he shall subsequently make adjustments to future assessments for any variation between estimated and actual costs on a fair and reasonable basis.

(Amended by 2002, 279, § 5, approved Aug 14, 2002, effective Nov 12, 2002.).

[No change in balance of note.].

(d) The executive director shall designate such authorized personnel employed by said insurance fraud bureau to have access to the following information and records when the same are relevant to any said insurance fraud bureau investigation: records kept by the registry of motor vehicles; records kept by the department of industrial accidents; records kept by the department of revenue; records kept by the department of transitional assistance; records kept by the Workers' Compensation Rating and Inspection Bureau; records kept by the department of employment and training; records kept by insurance companies; and criminal offender record information which may be disseminated pursuant to clause (b) of section one hundred and seventy-two of chapter six of the General Laws; provided, however, that access to such information and records shall be solely for the use by such authorized personnel in the performance of their official duties and responsibilities within said insurance fraud bureau.

(e) Any insurer licensed pursuant to the provisions of chapter one hundred and seventy-five of the General Laws, and any person engaged in the business of insurance in the commonwealth exempted from compliance with the licensing requirements of said chapter one hundred and seventy-five, or other similar entity, having reason to believe that an insurance transaction may be fraudulent, or having knowledge that a fraudulent insurance transaction is about to take place, or has taken place, shall within thirty days after determination that the transaction may be fraudulent, send to said insurance fraud bureau, on a form prescribed by the executive director, the information requested by the form and such additional information relative to the transaction and the parties involved as the executive director may require. Fraudulent insurance transactions shall include, but shall not be limited to, fraud and abuse of the system by attorneys, insurers, employers, medical providers, vocational rehabilitation providers, agents for attorneys or other service providers, claimants, or any other individuals or companies alleged to have engaged in unlawful acts under the provisions of section fourteen of chapter one hundred and fifty-two, sections one hundred and eleven A or one hundred and eleven B of chapter two hundred and sixty-six of the General Laws or other laws of the commonwealth concerning insurance fraud.

(f) Said insurance fraud bureau shall review each such report and undertake such further investigation as it deems necessary and proper to determine the validity of the transaction. Upon receipt of such report pursuant to subsection (e), or other information which provides reason to believe that any person has violated any law of the commonwealth concerning insurance fraud, said insurance fraud bureau may conduct an investigation within or without the commonwealth. A person having material which is located outside the commonwealth and is requested by the executive director may make it available to the executive director or his representative to be examined at the place where it is located. The executive director may designate representatives, including officials of the state in which the material is located, to inspect the material on his behalf, and may respond to similar requests from officials of other states.

(g) The executive director, or his designee, may request the attendance and testimony of witnesses and the production of books and records relevant to an investigation. If a person neglects or refuses to comply with any request to provide testimony or produce books and records relevant to the investigation, the executive director may refer the matter to the attorney general, the appropriate district attorney, or the United States attorney.

(h) Whenever the executive director is satisfied that a material fraud, deceit, or intentional misrepresentation has been committed in an insurance transaction or purported insurance transaction, or that a violation of subsection three of section fourteen of chapter one hundred and fifty-two of the General Laws or sections one hundred and eleven A and one hundred and eleven B of chapter two hundred and sixty-six of the General Laws or other laws of the commonwealth concerning insurance fraud has occurred, the executive director shall refer the matter to the attorney general, the appropriate district attorney or the United States attorney. The executive director shall also report any suspected violation of law to appropriate licensing agencies of the state and federal governments.

(i) In the absence of malice or bad faith, no insurer, member of said insurance fraud bureau, member of said governing board, or an employee or agent of said insurance fraud bureau or other person subject to the provisions of this section, or an employee or agent of such insurer or person, shall be subject to civil liability for damages by reason of any statement, report or investigation made pursuant to the provisions of this section.

(j) Beginning on August first, nineteen hundred and ninety-two and every six months thereafter said insurance fraud bureau shall file a report with the clerk of the house of representatives who shall forward the same to the joint legislative committee on insurance and to the joint legislative committee on commerce and labor and with the attorney general which shall include appropriate information, unless otherwise prohibited by law, on the disposition of matters referred to said insurance fraud bureau. Beginning August first, nineteen hundred and ninety-two and every six months thereafter the attorney general shall file a report with the clerk of the house of representatives who shall forward the same to the joint legislative committee on insurance and the joint legislative committee on commerce and labor and with said insurance fraud bureau which shall include appropriate information, unless prohibited by law, on the disposition of matters referred to the attorney general by said insurance fraud bureau. Said insurance fraud bureau shall periodically report to insurers regarding the status of matters reported to said insurance fraud bureau by insurers, the outcome of all investigations and prosecutions conducted by said insurance fraud bureau, and patterns and practices of fraudulent insurance transactions identified in the course of performing its duties. Said insurance fraud bureau shall perform such research functions and data collection efforts as directed by the governing board to assist in the prevention, detection and prosecution of fraudulent insurance transactions.

(k) A person convicted for the violation of any law concerning insurance fraud, following the investigation and referral for prosecution by said insurance fraud bureau, shall be ordered to make restitution to the insurer for any financial loss sustained as a result of such violation.

APPENDIX J

ACCOUNT DATA REPORT BY BILL BROOKS, OCTOBER 5, 1994

GOVERNMENT
EXHIBIT
46
MM 9/25

ACCOUNT DATA REPORT

ACCOUNT NAME: Pimental Steel Erectors
ADDRESS: 20 Herrick Road
Peabody, Mass. 01960
POLICY NUMBER: 77WZ CT9533
PERSON CONTACTED: Arthur Pimental,
Business Owner

DATE OF CONTACT: 10-4-94
DATE OF REPORT: 10-5-94
SURVEYOR: Bill Brooks/
A & S
TOTAL TIME SPENT: 2.8 Hrs

1. **NATURE AND SIZE OF ACCOUNT:** The insured describes his business has that of the installation of reenforcing bars and rods for floors and walls in smaller stores and commercial buildings that are to be constructed. He works as a sub-contractor for others and has been in business for seven years. However, he stated that work has been very slow for the past two years. Over the past year, Arthur has been working by himself and hiring one or two employees, as needed, by the job. At the present date there are no employees and also Arthur has no jobs at this time. He states that he has been out soliciting jobs and putting in bids for jobs but has no actual job site at this date. He has one truck, a flat bed unit with two mounted welded units plus an oxyacetylene torch set up for cutting and welding rebars. He states he has a small amount of pipe staging but it is very rarely used. He states that his radius of operation is up to 100 miles, but most of the work would be within 50 miles.
The above address is the insured home, a single family frame dwelling.

Turnover of help could be determined as he has no help.

APPENDIX K

LETTERS FROM TIMOTHY BERGERON TO ARTHUR PIMENTAL, JULY 17 & AUG. 23, 1995

ITT
CELEBRATING
75
YEARS

ITT HARTFORD

GOVERNMENT
EXHIBIT
41
MM 9/25

July 17, 1995

Boston Regional Office
3 Cambridge Center
P.O. Box 9107
Cambridge, MA 02142
Telephone (617) 621-4000

Mr. Arthur L. Pimental
Pimental Steel Erectors
20 Herrick Road
Peabody, MA 01960

RE: **Loss Control Service**
Workers Compensation
Policy Number: 77 WZ CT9533
Policy Term: 05/01/95 to 05/01/96
Producer's Code: 08-3475

Dear Mr. Pimental:

ITT Hartford is currently writing your Workers Compensation insurance in the Assigned Risk Pool. As a servicing carrier for the Pool, it is ITT Hartford's responsibility and desire to provide a minimum of one loss control consulting survey annually to all eligible policyholders. This service is provided at no additional cost and is for the purpose of assisting policyholders in their efforts to control costly accidents and/or injuries.

In an effort to provide this service, we attempted to schedule a survey with you on June 20th and July 10th and 13th, 1995; but, unfortunately, we were unsuccessful. This letter is being sent in a final attempt to arrange for a loss control survey.

Please note that failure to allow reasonable access for the purpose of loss control consultation is a violation of the good faith provisions in the Workers Compensation Insurance Plan and can subject your policy to cancellation. To avoid further action in this regard, it is our hope that you will contact me by *August 7, 1995* to arrange for a loss control survey. My number is 617-577-8100, ext. 4041.

We look forward to assisting you in your loss control effort.

Regards,

Timothy J. Bergeron

Timothy J. Bergeron
Senior Loss Control Consultant

Our reports are based upon observations or information available at the time of surveys which may not discover all hazards. We cannot warrant safety, health or compliance with any rule or regulation. We can only assist you in fulfilling your responsibility in controlling accidents.

Loss Control Department

ITT Hartford Insurance Group
Hartford Fire Insurance Company and its Affiliates
Hartford Plaza, Hartford, CT 06115

ITT
CELEBRATING
75
YEARS

GOVERNMENT
EXHIBIT
42
MM 9/25

ITT HARTFORD

August 23, 1995

Mr. Arthur L. Pimental
Pimental Steel Erectors
20 Herrick Road
Peabody, MA 01960

Boston Regional Office
3 Cambridge Center
P.O. Box 9107
Cambridge, MA 02142
Telephone (617) 621-4000

RE: Loss Control Service
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In an effort to provide this service, we attempted to schedule a survey with you on June 20th and July 10th and 13th, 1995; but, unfortunately, we were unsuccessful. This letter is being sent in a final attempt to arrange for a loss control survey.

Please note that failure to allow reasonable access for the purpose of loss control consultation is a violation of the good faith provisions in the Workers Compensation Insurance Plan and can subject your policy to cancellation. To avoid further action in this regard, it is our hope that you will contact me by *September 8, 1995* to arrange for a loss control survey. My number is 617-577-8100, ext. 4041.

We look forward to assisting you in your loss control effort.

Regards,

Timothy J. Bergeron
Timothy J. Bergeron
Senior Loss Control Consultant

CC: George Peters Ins., Agency, 220 Boylston Street, Newton, MA 02167

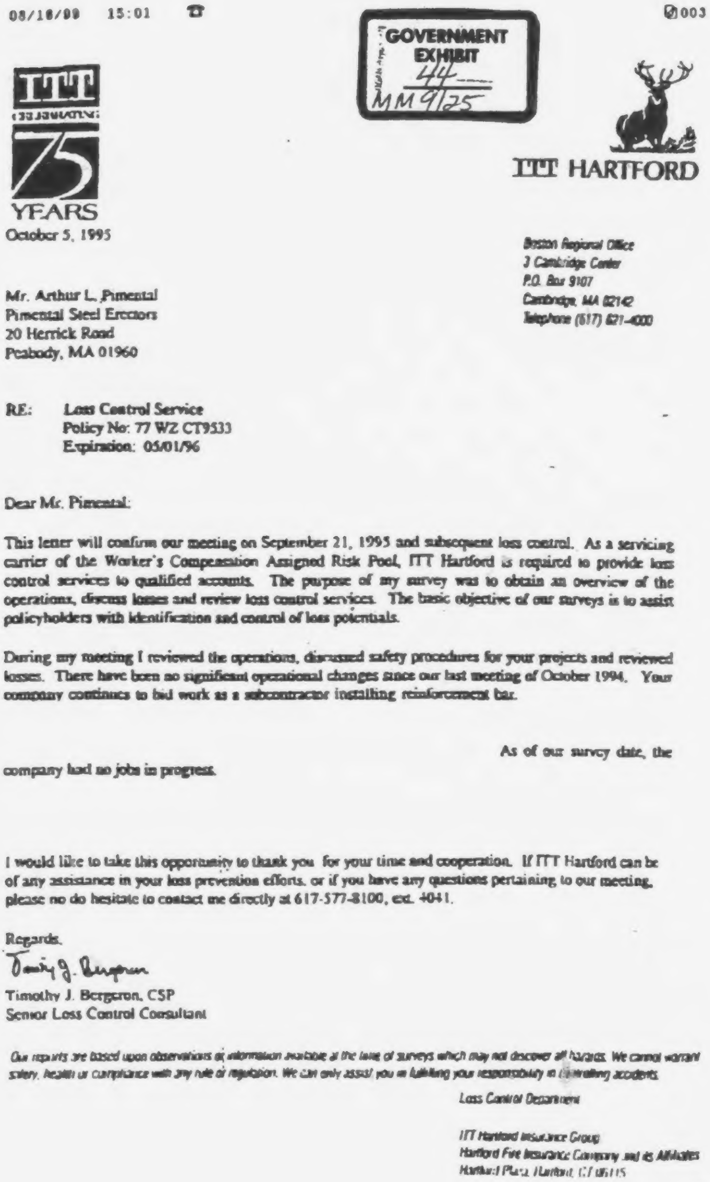
Our reports are based upon observations or information available at the time of surveys which may not discover all hazards. We cannot warrant safety, health or compliance with any rule or regulation. We can only assist you in fulfilling your responsibility in controlling accidents.

Loss Control Department

ITT Hartford Insurance Group
Hartford Fire Insurance Company and its Affiliates
Hartford Plaza, Hartford, CT 06115

APPENDIX L

LETTER FROM MR. BERGERON TO MR. PIMENTAL, OCTOBER 5, 1995



08/18/99 15:01 ☎ 003

GOVERNMENT EXHIBIT 44 MM 9/25

ITT
75
YEARS

ITT HARTFORD

Boston Regional Office
3 Cambridge Center
P.O. Box 9107
Cambridge, MA 02142
Telephone (617) 621-4000

October 5, 1995

Mr. Arthur L. Pimental
Pimental Steel Erectors
20 Herrick Road
Peabody, MA 01960

RE: Loss Control Service
Policy No: 77 WZ CT9533
Expiration: 05/01/96

Dear Mr. Pimental:

This letter will confirm our meeting on September 21, 1995 and subsequent loss control. As a servicing carrier of the Worker's Compensation Assigned Risk Pool, ITT Hartford is required to provide loss control services to qualified accounts. The purpose of my survey was to obtain an overview of the operations, discuss losses and review loss control services. The basic objective of our surveys is to assist policyholders with identification and control of loss potentials.

During my meeting I reviewed the operations, discussed safety procedures for your projects and reviewed losses. There have been no significant operational changes since our last meeting of October 1994. Your company continues to bid work as a subcontractor installing reinforcement bar.

As of our survey date, the company had no jobs in progress.

I would like to take this opportunity to thank you for your time and cooperation. If ITT Hartford can be of any assistance in your loss prevention efforts, or if you have any questions pertaining to our meeting, please no do hesitate to contact me directly at 617-577-8100, ext. 4041.

Regards,

Timothy J. Bergeron

Timothy J. Bergeron, CSP
Senior Loss Control Consultant

Our reports are based upon observations of information available at the time of surveys which may not discover all hazards. We cannot warrant safety, health or compliance with any rule or regulation. We can only assist you in fulfilling your responsibility in controlling accidents.

Loss Control Department

ITT Hartford Insurance Group
Hartford Fire Insurance Company and its Affiliates
Hartford Plaza, Hartford, CT 06115